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May 4, 2018

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Via Electronic Mail and Courier

Newfoundland and Labrador Board
of Commissioners of Public Utilities
120 Torbay Road
P.O. Box 21040
St. John's, NL A1A 5B2

Attention: Ms. G. Cheryl Blundon, Director of Corporate Services and Board Secretary

Dear Ms. Blundon:

Re: 2017 Hydro GRA - Consumer Advocate's Application dated April 5, 2018 - Submissions of the Island Industrial Customer Group

Further to the above, please find enclosed original and thirteen (13) copies of the following:

1. Submissions of the Island Industrial Customers; and

2. Court of Appeal Decision *Newfoundland and Labrador Hydro* v. *Newfoundland and Labrador (Board of Commissioners of Public Utilities)*, 2012 NLCA 38.

We trust you will find the enclosed to be in order.

Yours truly,

Stewart McKelvey

Paul L. Coxworthy

PLC/kmcd

Enclosure
c: Geoffrey P. Young, Corporate Secretary and General Counsel, Newfoundland & Labrador Hydro
Dennis M. Brown, Q.C., Consumer Advocate
Gerard Hayes, Newfoundland Power
Dean A. Porter, Poole Althouse
Denis J. Fleming, Cox & Palmer
Van Alexopoulos, Iron Ore Company of Canada
Benoit Pepin, Rio Tinto
Senwung Luk, Labrador Interconnected Group

IN THE MATTER OF the *Electrical Power Control Act,* 1994, SNL 1994, Chapter E-5.1 and the *Public Utilities Act*, RSN 1990, Chapter P-47 (the Act);

AND IN THE MATTER OF a General Rate Application (the "2017 GRA") by Newfoundland and Labrador Hydro to establish customer electricity rates for 2018 and 2019.

AND IN THE MATTER OF an application of the Consumer Advocate requesting clarification of the jurisdiction of the Board of Commissioners of Public Utilities (the "Board") to determine certain aspects of the 2017 GRA

SUBMISSIONS OF THE ISLAND INDUSTRIAL CUSTOMER GROUP

Issued: May 4, 2018

IN THE MATTER OF the *Electrical Power Control Act,* 1994, SNL 1994, Chapter E-5.1 and the *Public Utilities Act*, RSN 1990, Chapter P-47 (the Act);

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SUBMISSIONS OF THE ISLAND INDUSTRIAL CUSTOMER GROUP

1. These are the submissions of the Island Industrial Customer Group ("IIC Group") on the application of the Consumer Advocate with respect to the jurisdiction of this Board to determine certain aspects of the 2017 GRA, as filed on April 5, 2018 (the "Consumer Advocate's Application").

Summary of the position of the IIC Group

2. In summary, it is the position of the IIC Group that:

   (a) It would be premature for the Board to render a final decision on the Consumer Advocate's Application at this time;

   (b) The Board should defer its final decision on the Consumer Advocate's Application as the issue is not whether the Board has the jurisdiction to make a decision interpreting the Orders-in-Council OC2013-342 and OC2013-343, but rather whether the Board will be in a position to make a more reasoned interpretation based on a more complete factual context and at a future time when that factual context will have evolved and developed sufficiently to permit a reasoned decision; and

   (c) The possibility that deferral of the Board's final decision on the Consumer Advocate's Application may result in a "less efficient" process in the 2017 GRA should not trump the necessity of ensuring that the Board has a full, and fully-tested, evidentiary record to arrive at its final decision.

Positions expressed in this submission are preliminary

3. With respect, these submissions of the IIC Group are intended to assist the Board in determining whether it is premature to render a final decision on the Consumer Advocate's Application, and as such are not to be taken as the IIC Group's final position with respect to the law, facts and evidence that may be relevant and applicable to a final decision.

Scope of the question to be answered by the Board

4. While the Consumer Advocate's Application raises a number of issues of concern with respect to the 2017 GRA, ultimately, with reference paragraph 12 of that Application, the Consumer Advocate is seeking a determination of whether Orders-in-Council OC2013-342 and OC2013-342 restrict the Board's authority, in the 2017 GRA, to allow Hydro to recover any costs relating to components of the Muskrat Falls Project.

5. To the present knowledge and understanding of the IIC Group, the only costs relating to components of the Muskrat Falls Project for which Hydro is seeking recovery in the 2017 GRA are the actual operational and maintenance ("O&M") costs for the LIL and LTA that are incurred in 2018 and 2019 by Hydro, Muskrat Falls Corporation or some other entity[1], to transport forecast Recapture Energy purchases by Hydro during that period ("2018-2019 O&M Costs").[2]

6. Hydro is not seeking to directly recover the 2018-2019 O&M Costs in 2018-2019 rates. Rather, Hydro is seeking that the Board order what the IIC Group would characterize as a *recovery mechanism* for the 2018-2019 O&M Costs, referred to as the Off Island Power Purchase Deferral Account ("OPPDA"). Broadly speaking, the OPPDA, if ordered by the Board in the form proposed by Hydro, would result in any actual savings arising from Recapture Energy purchases by Hydro (to the extent these can be accounted for by a resulting reduction in Hydro fuel expenditures for thermal generation from the Holyrood Plant) being "netted out" against the actual 2018-2019 O&M Costs, all as arising and incurred in the 2018-2019 period. The only residual discretion left to the Board, should the OPPDA be ordered as proposed by Hydro, is the future disposition of the net balance in the OPPDA. While Hydro forecasts that the OPPDA would have a positive balance to the benefit of Hydro's Island Customers, there is no "stop loss" mechanism to prevent the OPPDA from going into a negative balance that would have to be recovered from Hydro's Island Customers.[3]

7. To the understanding of the IIC Group, Hydro is not proposing, if the OPPDA is not approved, that it will be seeking recovery of the 2018-2019 O&M Costs (or any other costs paid by Hydro that could be characterized as costs falling under the ambit of the Muskrat Falls Exemption Order and OC2013-343) in the rates arising from the 2017 GRA.

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1 For reasons discussed further below in these submissions, it would appear there is still some uncertainty on this point.

2 CA-NLH-177. Hydro's response suggests there could also be additional off-island purchases from other jurisdictions in 2018 and 2019 (at a saving for Hydro's Island Customers), although it is not clear whether these additional purchases would also increase the actual O&M costs which would be charged to Hydro in those years.

3 Hydro asserts that the Muskrat Falls Exemption Order and OC2013-343 oust the Board's jurisdiction to test the actual 2018-2019 O&M Costs; the IIC Group reserve their position on this point. Moreover, should the final decision of the Board be that the OPPDA is within its jurisdiction to approve, and is so approved, the IIC Group will be submitting that a mechanism for measuring and auditing the reduction in Hydro fuel expenditures for thermal generation resulting from Recapture Energy purchases (and other off-island purchases) will be prudent.

8. In light of the above understandings of the IIC Group, it is the position of the IIC Group that the only question that need be answered by the Board in response to the Consumer Advocate's Application is whether the Board is restricted from ordering in the 2017 GRA a *recovery mechanism* for the 2018-2019 O&M Costs, whether by the OPPDA as proposed by Hydro or by some other *recovery mechanism*.

The Muskrat Falls Exemption Order and OC2013-343

9. The relevant provisions of the *Muskrat Falls Project Exemption Order* are as follows:

> ***Muskrat Falls Project Exemption Order***
>
> ***Interpretation***
>
> *2. (1) In this Order*
>
> *(a) "LiL" means the transmission line and all related components of the Muskrat Falls Project described in section 2.1(1)(a)(ii) of the Energy Corporation Act, and for greater certainty "all related components" in that subparagraph includes converter stations, synchronous condensers, and terminal, telecommunications, and switchyard equipment;*
>
> ....
>
> *(f) "Muskrat Falls " means the hydroelectric facilities of the Muskrat Falls Project as described in subparagraph 2.1(1)(a)(i) of the Energy Corporation Act.*
>
> *(2) In this Order, references*
>
> *(a) to a public utility or an activity being "exempt" means the public utility or the activity is exempt from the application of*
>
> *(i) the Public Utilities Act, and*
>
> *(ii) Part II of the Electrical Power Control Act, 1994; and*
>
> *(b) to a corporation or limited partnership, where the corporation or limited partnership does not exist as of the date of this Order coming into force, shall be valid upon the creation of the corporation or limited partnership under the Energy Corporation Act and the Corporations Act or the Limited Partnership Act.*

Exemption

4. (1) Newfoundland and Labrador Hydro is exempt in respect of

(a) any

(i) expenditures, payments, or compensation paid to MFCo by Newfoundland and Labrador Hydro relating to the purchase and storage of electrical power and energy, the purchase of interconnection facilities, ancillary services, and greenhouse gas credits,

(ii) obligations of Newfoundland and Labrador Hydro in addition to subparagraph (i) to ensure MFCo's and LTACo's ability to meet their respective obligations under financing arrangements related to the construction and operation of Muskrat Falls and the LTA, and

(iii) expenditures, payments, or compensation paid to MFCo and revenues, proceeds or income received by Newfoundland and Labrador Hydro relating to the sale of electrical power and energy acquired from MFCo to persons located outside of the province

whether under one or more power purchase agreements or otherwise;

(b) any activity relating to the receipt of delivery, use, storage or enjoyment by Newfoundland and Labrador Hydro of any electrical power and energy, interconnection facilities, ancillary services, and greenhouse gas credits under paragraph (a);

(c) any expenditures, payments, or compensation paid to LilParty and claimed as costs, expenses or allowances by Newfoundland and Labrador Hydro relating to the design, engineering, construction and commissioning of transmission assets and the purchase of transmission services and ancillary services, electrical power and energy, from LilParty or otherwise with respect to the LiL, under one or more transmission services agreements, transmission funding agreements, or otherwise; and

(d) any activity relating to the receipt of delivery, use, storage or enjoyment by Newfoundland and Labrador Hydro of any transmission services and ancillary services, electrical power and energy, with respect to the LiL under paragraph (c).

10. The Order in Council OC2013-343 provides as follows (with underlining added for emphasis):

Under the authority of section 5.1 of the Electrical Power Control Act, *1994, the Lieutenant Governor in Council is pleased to direct the Board of Commissioners of Public Utilities to adopt a policy, subject to section 3, that:*

1) Any expenditures, payments or compensation paid directly or indirectly by Newfoundland and Labrador Hydro, under an agreement or arrangement to which the Muskrat Falls Project Exemption Order applies, to:

(a) *a LiLParty,*

(b) *a system operator in respect of a tariff for transmission services or ancillary services in respect of the LiL, that otherwise would have been made to a LiLParty, or*

(c) *Muskrat Falls Corporation, in respect of:*

(i) *electrical power and energy forecasted by Muskrat Falls Corporation and Newfoundland and Labrador Hydro to be delivered to, consumed by, or stored by or on behalf of Newfoundland and Labrador Hydro for use within the province, whether or not such electrical power and energy is actually delivered, consumed, or stored within the province,*

(ii) *greenhouse gas credits, transmission services and ancillary services, and*

(iii) *obligations of Newfoundland and Labrador Hydro in addition to those in paragraphs (i) and (ii) to ensure the ability of Muskrat Falls Corporation and Labrador Transmission Corporation to meet their respective obligations under financing arrangements related to the construction and operation of Muskrat Falls and the LTA shall be included as costs, expenses or allowances, without disallowance, reduction or alteration of those amounts, in Newfoundland and Labrador Hydro's cost of service calculation in any rate application and rate setting process, so that those costs, expenses or allowances shall be recovered in full by Newfoundland and Labrador Hydro in Island interconnected rates charged to the appropriate classes of ratepayers;*

2) *The costs, expenses or allowances of Newfoundland and Labrador Hydro described above, and the rates for Newfoundland and Labrador Hydro established by the Board of Commissioners pursuant to the direction under section 1, shall not be subject to subsequent review, and shall persist without disallowance, reduction or alteration of those costs, expenses or allowances or rates, throughout any processes for any public utility, including Newfoundland Power Inc., or any other process under the* Electrical Power Control Act, *1994 or the* Public Utilities Act*;*

3) *Notwithstanding sections 1 and 2, no amounts paid by Newfoundland and Labrador Hydro described in those sections shall be included as costs, expenses or allowances in Newfoundland and Labrador Hydro's cost of service calculation or in any rate application or rate setting process, and no such costs, expenses or allowances shall be recovered by Newfoundland and Labrador Hydro in rates:*

(a) *where such amounts are directly attributable to the marketing or sale of electrical power and energy by Newfoundland and Labrador Hydro to persons located outside of the province on behalf of and for the benefit of Muskrat Falls Corporation and not Newfoundland and Labrador Hydro; and*

(b) *in any event, in respect of each of Muskrat Falls, the LTA or the LiL, until such time as the project is commissioned or nearing commissioning and Newfoundland and Labrador Hydro is receiving services from such project.*

4) *In this Order in Council, terms shall have the same meaning ascribed to them in the Muskrat Falls Project Exemption Order.*

Section 3 of OC2013-343 and inclusion of costs in a rate application or in rates

11. The policy that OC2013-343 directs the Board to adopt is as stated in sections 1 and 2 of OC2013-343, but is made expressly subject to section 3 of OC2013-343.[4]

12. Hydro's position appears to be, in essence, that the Board does not need to consider how section 3 of OC2013-343 should apply to the OPPDA *recovery mechanism* for the 2018-2019 O&M Costs, because the 2018-2019 O&M Costs "*are not presently being included in Hydro's cost of service calculation and are not presently being sought for recovery in rates*" .[5]

13. Hydro's position completely ignores a key passage in section 3 of OC2013-343:

> *Notwithstanding sections 1 and 2, no amounts paid by Newfoundland and Labrador Hydro described in those sections shall be included as costs, expenses or allowances in Newfoundland and Labrador Hydro's cost of service calculation or in any rate application or rate setting process, and no such costs, expenses or allowances shall be recovered by Newfoundland and Labrador Hydro in rates...*

14. The IIC Group submit that Hydro's seeking of an order, in the 2017 GRA, for the OPPDA *recovery mechanism* for 2018-2019 O&M Costs is an inclusion of costs in a rate application or rate setting process, i.e. in the 2017 GRA, within the meaning of section 3 of OC2013-343. As used in section 3, the phrase *"in any rate application or rate setting process*" in relation to the inclusion of such costs is separate and distinct from the inclusion of such costs in the "*cost of service calculation*" or in "*rates*". Hydro's interpretation is an invitation to the Board to give no meaning to these words and to treat them as surplusage.

15. It is submitted that seeking an order for the inclusion of costs in a deferral account, where they will be set off against savings (from Recapture Energy) that would otherwise wholly accrue to Hydro's customers, is the very essence of a circumstance where costs are being included in a *rate application or rate setting process,* even if they are not being included in the present cost of service calculation or in the immediately-applicable rates. It is difficult to arrive at another example of inclusion of costs *"in any rate application or rate setting process*" which would have a separate and distinct meaning from inclusion of such costs in the "*cost of service calculation*" or in "*rates*".

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[4] The IIC Group have taken note that Hydro, at page 9, lines 29-30, has read into OC2013-343 that the directed policy is subject to "section 3 of the EPCA". With respect, and with reference to subsection 26(3) of the *Interpretation Act*, RSNL 1990, c. I-19, and to the other internal references to "sections" within OC2013-343 (including the "Notwithstanding sections 1 and 2" in section 3), we submit that this Hydro interpretation is incorrect.

[5] Hydro's Submission, page 24, lines 7-11.

16. Moreover, if it is Hydro's position that the OPPDA recovery mechanism ought not to be considered a component of the rates being sought by Hydro in the 2017 GRA, then that proposition needs to be examined in light of the statements of the Court of Appeal that indicate that deferral accounts can be considered to be a component of rates.[6]

17. If it is accepted that Hydro's seeking of an order, in the 2017 GRA, for the OPPDA *recovery mechanism* for 2018-2019 O&M Costs, is an inclusion of costs in the 2017 GRA, whether as a rate application, a rate setting process or in the rates themselves, then such an order may only be made by the Board if the conditions of subsection 3(b) of OC2013-343 can be considered to have been met.

The meaning of "*commissioning or nearing commissioning*" in subsection 3(b) of OC2013-343

18. Neither OC2013-343, nor the *Muskrat Falls Project Exemption Order* to which it makes reference, defines the terms "*commissioning*" or "*nearing commissioning*" used in subsection 3(b) of OC2013-343. Hydro has not submitted that there is anything within the legislative scheme within which OC2013-343 and the *Muskrat Falls Project Exemption Order* are embedded (the *Energy Corporation Act*, the *EPCA,1994*) which assist in interpreting these terms. Hydro has only pointed to the Power Purchase Agreement between Muskrat Falls Corporation and Hydro (the "MF PPA") and the Transmission Funding Agreement (the "TFA") as extrinsic aids to assist the Board in its interpretation of these terms.

19. The provisions of the MF PPA and the TFA cannot be construed as giving a direction to the Board to adopt a certain meaning for "*commissioning*" or "*nearing commissioning*". Having said this, the IIC Group would acknowledge that the Board can and should consider how much weight to give to the MF PPA and the TFA as extrinsic aids to interpretation.

20. At pages 15 and 16 of Hydro's Submission, Hydro presents its analysis of how the provisions of the MF PPA and the TFA are of assistance in interpreting the terms "*commissioning*" or "*nearing commissioning*" used in subsection 3(b) of OC2013-343. Without repeating or elaborating on Hydro's submissions, Hydro's analysis can be, it is submitted, fairly summarized as inviting the Board to come to the conclusion that the "*commissioning or near commissioning*" trigger (or gate, as the IIC Group would prefer to characterize it) in subsection 3(b) does not arise until all "the assets subject of [*sic - to?*] the MF PPA obtain commissioning or near commissioning status".[7] For the reasons set out below, the IIC Group submit that it is premature to come to that conclusion.

Hydro's alternative submission and matters of fact

21. Hydro has posited, in the alternative to Hydro's line of argument summarized above, that the Board may not accept Hydro's interpretation of "*commissioning or near commissioning*" as derived from the MF PPA and the TFA, and may "as a matter of fact" determine that the LTA and the LIL have each achieved "*near commissioning*" status and that each provide service. Hydro has made the alternative submission, in the case of the Board making such findings, that the "cost recovery scheme of OC2013-343 is

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6 *Newfoundland and Labrador Hydro* v. *Newfoundland and Labrador (Board of Commissioners of Public Utilities)*, 2012 NLCA 38, paragraphs 64 and 65.

7 Hydro's Submission, page 16, line 18 -19; see also page 21, lines 36 to page 22, line 2.

triggered with respect to the Deferral Account Scenario costs, and that such costs are appropriately included in the GRA and deferred...".[8]

22. At the risk of belabouring the obvious, Hydro's alternative submission implies Hydro's recognition of the merit of the IIC Group' position, expressed in these submissions, that the OPPDA *recovery mechanism* does comprise a prohibited inclusion of costs in a rate application as contemplated by section 3 of OC2013-343, unless the conditions of subsection 3(b) of OC2013-343 are met.

23. As implicitly recognized by Hydro's alternative submission, the interpretation of "*commissioning or near commissioning*" could require findings of fact by the Board.

24. In the submission of the IIC Group, the Board has already heard, in the 2017 GRA testimony of Hydro's President Jim Haynes,[9] that there remains a great deal of uncertainty, from an engineering and operational perspective, as to when the LIL and LTA will be able to considered to be commissioned, or near commissioning or considered to be "used and useful" by Hydro. In the submission of the IIC Group, it is reasonable to expect that subsequent Hydro witnesses should be able to inform themselves on the questions put to Mr. Haynes, given that the GRA is not scheduled to resume until July 2018.

25. Moreover, Hydro in its Submission has stated that "The agreements to be concluded by Hydro to allow for pre-commissioning use of the LIL and the LTA to effect the Deferral Account Scenario would constitute such additional agreements"[10] (underlining added). Surely, it is not unreasonable, even if the prudency of such agreements have been exempted from the Board's purview, for the Board to consider whether or not a final decision in respect of section 3(b) of OC2013-343 should be made before such agreements (or "arrangements", the alternative terminology used in OC2013-343) are in existence.

26. Further, there is no necessity, nor it is respectfully submitted is it the most reasonable course, to decide now whether the LIL and LTA (or the Muskrat Falls Project considered as a whole) are "near commissioning". The issues are whether LIL and LTA (or the Muskrat Falls Project considered as a whole) will be reasonably considered to be "near commissioning" for the purposes of the Board's final Order in the 2017 GRA, and if so from what date (which may be later than 2018). As the testimony of Mr. Haynes indicates, there are a number of uncertainties around even whether or when the LIL and LTA will be able to considered "used and useful" (let alone "commissioned or near commissioning") in 2018.

27. In the submission of the IIC Group, it is reasonable to expect that deferring a final decision on the Consumer Advocate's Application and allowing for the opportunity for further evidence to be elicited in the 2017 GRA hearing, should provide a more complete factual context to assist the Board in its interpretation of "*commissioning or near commissioning*" as used in subsection 3(b) of OC2013-343. The possibility that the deferral of a final decision may result in a "less efficient" GRA process should not trump

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[8] Hydro's Submission, page 23, lines 17-26.

[9] April 24, 2018 Transcript, page 22, line 22 to page 28, line 14; page 29, line 21 to page 30, line 15; page 30, line 17 to page 32, line 15.

[10] Hydro's Submission, page 19, lines 11-13.

the necessity of ensuring that the Board has a full, and fully-tested, evidentiary record on which to base its decision.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at St. John's, Newfoundland and Labrador, this 4th day of May, 2018.

POOLE ALTHOUSE

Per: _____
Dean A. Porter

STEWART MCKELVEY

Per: _____
Paul L. Coxworthy

COX & PALMER

Per: _____
Denis J. Fleming

TO: The Board of Commissioners of Public Utilities
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TO: Newfoundland Power
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Attention: Gerard M. Hayes, Legal Counsel

TO: Browne Fitzgerald Morgan & Avis
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St. John's, NL A1B 4J9
Attention: Dennis M. Browne Q.C., Consumer Advocate

Date: 20120619
Docket: 10/113
Citation: *Newfoundland and Labrador Hydro v. Newfoundland and Labrador (Board of Commissioners of Public Utilities)*, 2012 NLCA 38

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

BETWEEN:

NEWFOUNDLAND AND LABRADOR HYDRO — APPELLANT

AND:

THE BOARD OF COMMISSIONERS OF PUBLIC UTILITIES — FIRST RESPONDENT

AND:

THE CONSUMER ADVOCATE as represented by THOMAS JOHNSON — SECOND RESPONDENT

AND:

CORNER BROOK PULP AND PAPER LIMITED — THIRD RESPONDENT

AND:

NORTH ATLANTIC REFINING LIMITED — FOURTH RESPONDENT

AND:

TECK RESOURCES LIMITED — FIFTH RESPONDENT

AND:

VALE NEWFOUNDLAND AND LABRADOR LIMITED — SIXTH RESPONDENT

AND:

ABITIBI CONSOLIDATED COMPANY OF CANADA — SEVENTH RESPONDENT

AND:

NEWFOUNDLAND POWER INC. — EIGHTH RESPONDENT

AND

Docket No. 10/114

BETWEEN:

THE CONSUMER ADVOCATE as represented by THOMAS JOHNSON — APPELLANT

AND:

THE BOARD OF COMMISSIONERS OF PUBLIC UTILITIES — FIRST RESPONDENT

AND:

NEWFOUNDLAND AND LABRADOR HYDRO — SECOND RESPONDENT

AND:

CORNER BROOK PULP AND PAPER LIMITED — THIRD RESPONDENT

AND:

NORTH ATLANTIC REFINING LIMITED — FOURTH RESPONDENT

AND:

TECK RESOURCES LIMITED — FIFTH RESPONDENT

AND:

VALE NEWFOUNDLAND AND LABRADOR LIMITED — SIXTH RESPONDENT

AND:

ABITIBI CONSOLIDATED COMPANY OF CANADA — SEVENTH RESPONDENT

AND:

NEWFOUNDLAND POWER INC. — EIGHTH RESPONDENT

Coram: Green C.J.N.L., Mercer and Harrington, JJ.A.
Appealed From: Newfoundland and Labrador Board of Commissioners of Public Utilities, (Order No. P. U. 25)

Appeal Heard: December 9, 10 and 13, 2010
Judgment Rendered: June 19, 2012

Reasons for Judgment by the Court.

Counsel for Newfoundland and Labrador Hydro:	Geoffrey Young
Counsel for the Consumer Advocate:	Thomas Johnson
Counsel for Newfoundland and Labrador Board of Commissioners of Public Utilities:	Dan Simmons Jackie Glynn

Counsel for Corner Brook Pulp and Paper Limited, North Atlantic Refining Limited, Teck Resources Limited and Vale Newfoundland and Labrador Limited:	Paul Coxworthy Dean Porter
Counsel for Abitibi Consolidated Company of Canada:	Greg Moores
Counsel for Newfoundland Power Inc.:	Ian Kelly, Q.C. Gerard Hayes

By the Court:

[1] Two appeals come before this Court arising from a preliminary decision of the Newfoundland and Labrador Board of Commissioners of Public Utilities ("Board") in Order No. P.U. 25 (2010) ("Decision") issued August 26, 2010. They come directly to this Court under s. 99 of the *Public Utilities Act*, RSNL 1990, c. P-47 as amended ("*PUB Act*").

[2] Fundamentally, what is at issue in this appeal is whether certain savings generated in a rate stabilization plan established by the Board can be shared among all residential and industrial power consumers on the island portion of the province or only among industrial customers. The appeal engages the interpretation of the Board's governing legislation, in particular, s. 75 of the *PUB Act*, and whether the Board erred in determining it did not have jurisdiction to allocate savings to customers other than certain industrial customers.

[3] The appellant, Newfoundland and Labrador Hydro ("Hydro"), is a Crown corporation and the appellant, the Consumer Advocate ("Advocate"), is a statutorily appointed representative of the interests of domestic and general service customers of both Hydro and Newfoundland Power Inc. ("Newfoundland Power") pursuant to s. 117 of the *PUB Act*. The Advocate does not represent Hydro's industrial customers or the utility, Newfoundland Power. A hearing was conducted following written submissions by interested parties regarding a series of preliminary questions posed by the Board. The questions were raised in the context of a pending general rate application by Hydro affecting its industrial customers to have interim rates for the years 2008, 2009 and 2010 made final ("2009 GRA").

[4] The appellants allege that the Decision unduly restricts the Board's authority to deal with the disposition of certain surplus revenue credits or system savings which have been accrued under a rate stabilization plan ("RSP") in accounts established for tracking cost of service to Hydro's industrial customers for the three year period under consideration. As noted, the characterization of these accounts and the determination of whether customers other than industrial customers can benefit from the disposition of these credits either prospectively or retrospectively is at the core of this appeal.

[5] The appellants allege that the Board erred by fettering its jurisdiction when it ruled in its preliminary determination of the scope of Hydro's 2009 GRA that it was prevented from conferring any benefit from the disposition of systems savings accruing within the RSP for industrial customers on any of its other customers. Specifically, the Board held that the fact that the rates for Hydro's non-industrial customers had been made final for the period 2008 to 2010 barred consideration of any claim of entitlement to the systems savings by non-industrial customers when settling the final rates for industrial customers for the three year period affected by the 2009 GRA.

BACKGROUND

[6] Hydro established the RSP effective January 1, 1986 under a directive from the Provincial Government. The Board modified and approved the RSP. The object of the RSP was to provide rate stability to Hydro's customers through a mechanism designed to eliminate volatility in Hydro's revenue requirements beyond its reasonable expectations.

[7] The RSP provided for adjustments to recover the differences between the forecasted test year costs used to set rates and the actual costs affected by: (i) differences in the price of bunker C fuel affecting the cost of oil-fired power generation at Holyrood, ii) variation in Hydro's hydraulic power generation; and iii) major variations in load consumed by its customers.

[8] These appeals directly affect customers who are on the Interconnected System on the island portion of the Province. These include Hydro's one utility customer, Newfoundland Power and in turn all of Newfoundland Power's customers. These appeals also directly affect Hydro's industrial customers and Hydro's own residential and general service customers on the Island Interconnected System.

[9] There are two major electrical systems operating within the Province. The Island Interconnected System functions as a stand-alone system comprised of various hydro-electric developments and thermal power generated at the Holyrood Thermal Generating Station ("Holyrood"). The Labrador Interconnected System is supplied by Churchill Falls and is connected to the North American power grid. The more remote and isolated areas of the Province, whether on the island or in Labrador, are serviced by individual diesel generating facilities owned and operated by Hydro.

[10] The primary source of electrical power and energy for the Island Interconnected System is hydro-electric with the other major source of power being the Holyrood generating plant which burns bunker C oil purchased by Hydro on the world oil markets. It is much less costly for Hydro to generate electricity on the Island Interconnected System by its hydro-electric sources than it is to generate electricity at Holyrood.

[11] Hydro is the primary generator of electricity in the province. Hydro sells its power to utilities, industrial and its own 35,000 residential and general service customers in over 200 communities across the Province. Newfoundland Power serves over 239,000 residential and commercial customers making up approximately 85% of all electricity customers in the province. Newfoundland Power purchases approximately 90% of its electricity from Hydro and generates the balance from its own smaller hydro electric stations.

[12] Hydro's overall fuel costs at Holyrood on an annual basis can vary significantly. These fuel costs are affected by:

a) the price of a barrel of oil as determined by the world market;

b) the amount of available hydro-electric energy - which essentially is a function of the amount of precipitation; and

c) the amount of energy consumed by the customers on the Island Interconnected System (referred to as "load").

[13] Given the variability that can occur in Hydro's annual fuel costs, a mechanism in the form of the RSP was developed to ensure that Hydro's rates are adequately collecting the cost of fuel that it is purchasing to service the needs of the Island Interconnected System customers. Absent such a mechanism, the rates that are set for Hydro to charge its customers for electricity which are based on forecast costs for the test year, could cause

Hydro to lose or gain considerable sums of money in a given year. At Hydro's last general rate application filed in 2006, a 2007 test year was used as the basis for establishing the electricity rates to be charged by Hydro. At that time, it was known that large increases in oil prices or lower than expected hydrology could create a significant revenue shortfall for Hydro. On the other hand, higher than expected hydrology at its hydro electric generating facilities and lower than expected load consumption by industrial consumers could result in large unexpected revenues.

[14] The RSP provides a mechanism to smooth the effects on rates of increases or decreases in commodity costs over time. The RSP has been modified a number of times since its introduction. However, the current RSP has been in place since Hydro's general rate application in 2003.

[15] Under the RSP, these variables are tracked for the purpose of calculating RSP adjustment rates for Hydro's utility and industrial customers. In the case of Newfoundland Power, Hydro makes an annual application to the Board for approval of the appropriate RSP adjustment to take effect on July 1st of each year. In the case of the industrial customers, the RSP adjustment takes effect on January 1st of each year. The amount of the rate adjustment and whether the adjustment will be a decrease or increase on January 1st or July 1st, as the case may be, depends upon the net activity in the RSP as calculated in accordance with its provisions.

[16] The load variation element of the RSP is of particular significance on these appeals. The load variation - the amount of energy consumed compared to the amount forecast for the test year - works generally in a similar manner to fuel price and hydrology - to the extent that if higher load occurs (i.e., more electrical energy must be generated to meet customers' electricity requirements than was forecast when rates were last set) it results in higher fuel costs at Holyrood and the corresponding amount is owed by customers to the RSP to be recovered in rates in a future period. However, if the load is lower than the test year forecast, it will result in an amount owing to customers from the RSP.

[17] In another way, the load variation provisions work differently from the fuel price and hydrology elements. Load variation can affect the amount of oil that is required to be burned at Holyrood, thereby affecting Hydro's costs. Load variation also has an impact upon the amount of revenue that Hydro receives from its rates. At Hydro's 2003 GRA the RSP was amended so as to place the financial consequences of the load variation on the

customer class whose actual load varied from the test year load forecast. Therefore, in a year in which the industrial customers' load was higher than forecast in the last test year, the effect of the variation would be to cause rate increases for the affected class.

[18] Increased industrial customers' load causes higher rates between GRAs because energy rates for this class are based upon Hydro's average costs of electricity production (e.g. reflecting a mix of cheaper hydro power and more expensive Holyrood power). However, the incremental energy production to actually service the increase in load comes from Holyrood where the cost of production is higher than the average energy cost which the energy rate reflects. Therefore, on each extra kilowatt hour that Hydro sells to fulfill an increased load, Hydro would, without an adjustment mechanism, be actually losing money. While it is collecting more revenue from the industrial customers because of the increased load, the increase in revenue is outstripped by the extra cost to which it is being put in order to supply the extra kilowatt hour. The load variation provisions in the RSP require that customer class which caused the load increase to bear the burden of those costs in a future period so that Hydro is made whole.

[19] On the other hand, if the industrial customers' load were to decrease relative to the test year forecast, the opposite would be the case. That is to say, a decrease in load would cause Hydro to burn less oil than anticipated thereby being able to supply more of the system's requirements with cheaper hydro energy instead of being required to burn the estimated number of barrels of oil that its rates were based upon in the last GRA. In this instance, while Hydro's revenues from the industrial customers would be decreased, so would Hydro's costs. In fact, the avoided costs vastly outstrip the loss in revenue occasioned by the decrease in load. The load variation provisions in the RSP assign to the customer class that caused the load decrease the benefit of these cost savings in a future period. It is this load feature of the RSP that is a key aspect in the factual matrix of these appeals.

[20] At Hydro's 2003 GRA, the participating parties agreed that both the revenue and the fuel amounts related to load variation should be assigned to the customer base within the RSP where the load variation occurred. Previously, revenues were assigned to the RSP based on which customer class caused the load variation but the related fuel costs were allocated between Newfoundland Power and the industrial customers based on the 12 months-to-date energy ratios for each customer class. The change in customer assignment was considered to improve fairness because costs

would now be assigned between Newfoundland Power and industrial customers based on causality.

[21] Hydro's 2006 GRA resulted in a Settlement Agreement which provided for a further review of the RSP (the "2007 RSP Review"). It was anticipated that any changes resulting from the 2007 RSP Review would be implemented by January 1, 2008. The allocation of load variation transfers was one of the items to be addressed in the review. Meanwhile, arising out of Hydro's 2006 GRA, final rates were approved for the industrial customers to be effective January 1, 2007 in Order No. P.U. 8 (2007).

[22] Starting in the fall of 2007, significant events were taking place in the province's pulp and paper sector adversely affecting the load variation of the normal operation of the RSP. In November of 2007, Corner Brook Pulp and Paper Limited shut down a paper machine which resulted in a 22% reduction in load from the industrial customers on the island. In 2008, Abitibi Bowater closed its paper mill at Grand Falls-Windsor. In anticipation of projected volatility in load during the 3 year rate period, Hydro sought and obtained an order from the Board for interim rates for 2008 and 2009 which were effectively sustaining those that were in place for 2007.

[23] A projected rate change that otherwise would have taken place for industrial customers on January 1, 2008 under the established rules, prompted Hydro to take another approach. On December 20, 2007 Hydro applied to the Board for an Order "that the Board approve and make an Interim Order that the rates currently in effect for industrial customers, which were approved in Order No. P.U. 8 (2007) and which are set out in Schedule "A" continue in effect on an interim basis until such time as the Board issues a final order with respect to industrial customers' rates for 2008".

[24] Hydro provided the Board with its rationale for the requested Order in the following terms:

> By Order No. P.U. 40 (2003) the Board approved the manner by which the Rate Stabilization Plan (RSP) is calculated and by which RSP adjustments are applied to the rates charged by Hydro to its Island Interconnected Industrial Customers. Under that Order, Hydro is required to provide an Industrial Customer fuel price projection to the Board and to certain of Hydro's customers by the tenth working day of October each year.

> Due initially to a projected increase in the RSP rate and subsequently to a significant load change of one of Hydro's Industrial Customers, Hydro determined that there was potential volatility in its Industrial Customers' rates both for 2008 and future years. The impact of these changes was deemed to be significant and it was judged to be prudent to further analyze and consider their impact, in conjunction with also determining the final level of year end hydraulic balances, prior to making application to the Board with respect to an appropriate treatment of this issue.
>
> Hydro wishes to have further opportunity to consider the appropriate means to address Industrial Customers' rates issues.

The Board approved the interim rates requested.

[25] On June 30, 2009, Hydro applied to the Board requesting the finalization of rates charged to industrial customers.

[26] In its cover letter accompanying the application, Hydro stated:

> Although the attached Application does not contain any proposed changes, the Board may wish to consider suspension of the existing load variation allocation rules and holding in abeyance current and future load variation amounts until such time as Hydro can develop a proposal to address the current anomalies in the RSP. Hydro anticipates that an application with regard to the RSP load variation can be made prior to the end of 2009.

[27] Since the industrial customers' rates were declared interim effective January 1, 2008 there had been large sums of money accruing in the RSP due to the fuel savings that Hydro was experiencing at Holyrood due to the steep decline in the load of the industrial customers since Hydro's last GRA. Evidence filed in the proceeding before the Board forecast that over the period 2007 to 2010 some $74 million in system savings tied to load would have accrued, with some $68 million accruing since the industrial customers' rates were declared interim.

[28] The load variation balances that have been assigned to the industrial customers under the interim RSP rules produced rate scenarios well beyond reasonable expectations. Using the refunding methods provided by the RSP rules, the forecast average rates for industrial customers for 2010 were projected to be *negative* figures reflecting a scenario where there would be more money to be refunded to customers than energy revenues received from them by Hydro.

[29] The industrial customers claimed entitlement to the entire load variation balance. Based on the available information prior to the preliminary hearing, the current industrial customers were paying approximately $20 million in annual electricity costs. However, $68 million of load variation transfers were accumulating as system savings on an interim basis since January 1, 2008 which represented approximately three and a half times the annual electricity costs of the current industrial customers.

[30] Hydro, Newfoundland Power and the Consumer Advocate in their evidence recommended that the Board allocate these system savings between the industrial customers and Newfoundland Power using a cost of service approach.

[31] The Board advised all parties that the public hearing respecting the 2009 GRA would not proceed and further advised that the Board wished to hold a preliminary hearing into its jurisdiction and authority. Counsel for each of the parties and the Board met and developed the preliminary issues that would be addressed by the Board. These issues were then formally posed to the Board by way of a letter from Hydro's counsel dated June 2, 2010.

[32] The questions posed were:

> Does the Board have the jurisdiction to issue an order which changes how the Rate Stabilization Plan (RSP) operated before the date of the order and, if so, does this jurisdiction extend to any aspect of the operation of the RSP, including the rate charged to customers, the determination of the balance(s) in the RSP, and how these balances are allocated to customers or customer classes? In particular:
>
> - Does legislation or common law give the Board any specific relevant authority or alternatively, restrict the Board's authority?
>
> - What would generally accepted sound public utility practice as set out in s. 4 of the EPCA require?
>
> - Are there any concerns in relation to vested rights, i.e. does the language of the RSP create a right/obligation in each of the customers or customer classes? If so, at what point does this right/obligation accrue? Does this mean that credits/debits allocated to each customer in accordance with the plan are the responsibility of or to the benefit of customers in the class at the time of the accumulation or does the Board have the jurisdiction to order alternative disbursements of the balances?

- Does the issuance of Order Nos. P.U. 34 (2007), P.U. 37 (2008), P.U. 6 (2009), the filing of Hydro's application on June 30, 2009, or any other order of the Board impact the jurisdiction of the Board?

THE BOARD DECISION

[33] The written decision of the Board issued August 26, 2010 was divided into a discussion of deferral accounts and interim orders. The deferral account section dealt primarily with the Board's general jurisdiction over the disposition of balances accumulated in deferral accounts, such as the RSPs. The interim order section dealt more specifically with the Board's jurisdiction under section 75 of the *PUB Act* to deal with balances accumulated due to a difference between interim and final rates.

[34] The Board considered the RSP to be an example of a deferral account. Such an account is used for various purposes in public utility rate regulation to, amongst other things, allow a public utility to maintain its approved rate of return when actual revenues or expenses vary from those that were forecast when rates were set. This would reduce fluctuations in rates charged to consumers of power if such variances were not spread over longer periods of time.

[35] With respect to its jurisdiction over deferral accounts generally the Board stated at p. 8:

> While the Board has jurisdiction in relation to deferral accounts the Board has stated that it views the use of these accounts to be an extraordinary measure ... The Board believes that its jurisdiction with respect to deferral accounts is limited by the principles of predictability and fairness, as discussed by the Alberta Court of Appeal in *ATCO [Calgary (City) v. Alberta (Energy and Utilities Board*, 2010 ABCA 132], and does not necessarily extend to changing how balances are calculated and allocated in the past.

[36] The Board continued at p. 9:

> In the Board's view changing how the RSP operated in prior years would be analogous to the situation that Mr. Justice Green suggested might constitute retroactive regulation in *Reference: re s. 101 of the Public Utilities Act (Nfld)* (1998), 164 Nfld & PEIR 60 (Nfld. C.A.) at paragraph 91:

> *The issue, therefore, is not whether the Board may revise the definition of excess revenue and then apply the revised definition to the results of previous years. That might well engage the principle of non-retroactivity.*
>
> (Emphasis in original.)

[37] The Board determined that the interim orders gave the Board the full jurisdiction to change all aspects of the industrial customers' rate, including the power to change the rules and regulations affecting the RSP.

[38] However, having noted that the Hydro applications for interim rates and its 2009 GRA seeking the approval of a final rate for industrial customers had not sought any changes to the RSP, the Board held at p. 9 that the RSP rules applying to allocation of load variations continued to apply:

> In the absence of an application, the Board did not take it upon itself to consider suspending the operation of the load variation allocation rules as suggested by Hydro in its correspondence [that accompanied the June 20, 2009 application for final rates].

[39] The Board then considered the effect on its jurisdiction of the interim rate orders and section 75 of the *PUB Act* which provides in pertinent part:

> **75.** (1) The board may make an interim order unilaterally and without public hearing or notice, approving with or without modification, a schedule of rates, tolls and charges submitted by a public utility, upon the terms and conditions that it may decide.
>
> ....
>
> (3) The board may order that the excess revenue that was earned as a result of an interim order made under subsection (1) and not confirmed by the board be
>
> (a) refunded to the customers of the public utility; or
>
> (b) placed in a reserve fund for the purpose that may be approved by the board.

[40] Addressing the position of Hydro, Newfoundland Power and the Consumer Advocate, the Board stated:

> Hydro, Newfoundland Power and the Consumer Advocate suggest that [s. 75] permits the Board to place any excess revenue paid by the Industrial Customer group as a result of the interim rates into an account for the possible benefit of [another] customer group. This interpretation would not appear to be consistent

> with the scheme of the legislation generally or with generally accepted sound public utility practice which requires that rates be just and reasonable and not unjustly discriminatory. The Board has reference to the comments of Mr. Justice Green in Reference Re: s. 101 of the Public Utilities Act (Nfld.) (1998), 164 Nfld. & P.E.I.R. 60 (Nfld. CA) ... at paragraph 18 ...

[41] The Board then concluded at pp. 11-12:

> Reading s. 75 in the overall context of the legislation and regulatory structure the Board believes that a purposeful interpretation would require that the refund or the reserve fund must, to the extent possible, be for the benefit of the customer group which was found to have paid the excess revenue. There may be times when it is not practical to refund to the customers that paid the excess, for example where the amount is nominal or the customers cannot be found. The Board believes that, in the absence of extraordinary circumstances, a finding that interim rates for a group of customers were in excess of reasonable rates would require that the same customer group be effectively charged the reasonable rates through a refund or the use of a reserve account.

[42] In response to the position of the industrial customers that the ability to set final rates under s. 75 of the *PUB Act* did not authorize the Board to revise the RSP rules that applied to the industrial customers, the Board concluded at p. 13:

> The interim orders clearly provide the Board with the full jurisdiction to, in the words of the Supreme Court of Canada, "*modify in its entirety the rate structure*" for the Industrial Customer group, which includes all aspects of the Industrial Customers' rate, including the RSP rate. The Board does not accept the position of the Industrial Customers that the Board has no power to change the rules and regulations affecting the RSP.

[43] However, the Board held at p. 14 that:

(i) it has jurisdiction to set "just and reasonable rates" for the Industrial Customers for 2008 and 2009, including the determination of the industrial customers' RSP rates and the manner of operation of the Industrial Customer RSP for those years,

(ii) "given the manner in which this matter was brought forward", it has no jurisdiction to change the manner in which the Newfoundland Power RSP operated in prior years, either in terms of the rates charged or the resulting balances, and

(iii) it has jurisdiction to determine whether overpayments by the Industrial Customers resulting from the interim rates should be refunded to the industrial customer group or placed in a reserve account to the benefit of that customer group.

[44] Although the Board ultimately determined that its jurisdiction to deal with the RSP balance was limited to determining "...whether any overpayment as a result of the interim rates is to be refunded to the Industrial Customer group or placed in a reserve account to the benefit of the Industrial Customer group", the Board essentially determined that the accrued balance of system savings had to be used for the benefit of the Industrial Customer class only and could not be applied to the benefit of other customers on the Island Interconnected System or used for other purposes in connection with the operation of the Island Interconnected System.

LEAVE TO APPEAL

[45] Section 99 of the *PUB Act* provides that an appeal from an order of the Board can be taken directly to the Court of Appeal upon a question of the Board's jurisdiction or upon a question of law, but only with leave of a judge of the Court.

[46] Leave to appeal will only be granted: (i) where it is apparent that the question on appeal is one of jurisdiction or law; and (ii) where the appellant can show "a reasonably arguable case for success" on the appeal: *Consumer Advocate v. Newfoundland Power Inc.*, 2006 NLCA 20, 255 Nfld. & P.E.I.R. 234, per Cameron J.A. at para. 10; *Labrador City (Town) et al. v. Newfoundland and Labrador Hydro Inc.* (2004), 241 Nfld. & P.E.I.R. 81 (NLCA) at para. 5.

[47] It is manifest from the notices of appeal that have been filed that each of the stated issues involves a question as to whether the Board erred in determining its jurisdiction or erred in law in reaching the Decision it did. Given the position taken by the respondents and the Board in not opposing leave, it can be presumed that there is a reasonably arguable case to be made on appeal.

[48] In this case, on the application for leave, all parties, except the Board, who were provided with notice pursuant to s. 99 (2), consented to leave being granted and, in the case of the Board, it stated that it "does not object" to the granting of leave. Accordingly, on a preliminary application, both the Consumer Advocate and Hydro were granted leave to appeal.

[49] Newfoundland Power supports Hydro and the Consumer Advocate on these appeals. Various industrial customers support the decision of the Board. The Board itself was also represented by counsel in support of the Decision.

ISSUES

[50] The following issues arise on these appeals:

(a) What is the appropriate standard of review to be applied to the Board's decision?

(b) What is the extent of the Board's jurisdiction to change the operation of the RSP, particularly with respect to the operation of the load variation component, and to allocate load variation balances accrued to Industrial Customers before and after the interim order effective January 1, 2008 for the benefit of other customers on the Island Interconnected System?

(c) Is the Board's jurisdiction limited to determining whether any overpayment as a result of the interim rates is to be refunded to the industrial customer group or placed in a reserve account for the benefit of the industrial customer group?

[51] The main focus of this appeal is the Board's determination that it did not have the jurisdiction to allocate balances accrued under the RSP rules, while the industrial customer rates were interim, to other customer classes. The practical effect of this determination is that the system savings which accrued in what was characterized as a "deferral account" while rates were interim must flow to the exclusive benefit of the industrial customers.

ANALYSIS

(a) Statutory Framework and Basic Principles

[52] An outline of the Board's statutory framework and the nature of deferred accounts and interim rates will assist in the resolution of the issues before the Court.

[53] In *Reference Re Section 101 of the Public Utilities Act (Nfld.)* (1998), 164 Nfld. & P.E.I.R. 60 (Nfld.C.A.) ("*Stated Case*"), Green J.A. noted the Board's statutory basis as follows:

> [13] The answers to the questions which have been posed must, of course, be given taking account of the legislative framework within which the Board operates. The Board is a creature of statute and its jurisdiction and powers to deal with matters brought before it, and the manner of dealing with such matters, must be found, either expressly or impliedly, within the statutes conferring jurisdiction on and governing the operation of the Board.

[54] The Board's jurisdiction and powers are governed by the *PUB Act* and the *Electrical Power Control Act, 1994*, SNL 1994 c. E-5.1 (*"EPC Act"*). The *PUB Act* confers on the Board the power for "the general supervision of all public utilities". Specifically the Board has sole authority to approve the rates charged by public utilities – ss. 70(1) and 71 – and the power to approve interim rates unilaterally – s. 75. The breadth of the Board's authority over rates is illustrated by s. 76 which confers the right to rescind or alter rates, s. 82 which confers the right to investigate a rate, where the Board believes that it is unreasonable or unjustly discriminatory, and ss. 84-87 which authorize the Board, following a formal complaint, to investigate and to cancel rates and void contracts where rates are found to be unjust, unreasonable, insufficient or unjustly discriminatory.

[55] In considering the extent of the Board's powers under the *PUB Act* reference must be made to s. 118 which states:

> 118.(1) This Act shall be interpreted and construed liberally in order to accomplish its purposes, and where a specific power or authority is given the board by this Act, the enumeration of it shall not be held to exclude or impair a power or authority otherwise in this Act conferred on the board.
>
> (2)The board created has, in addition to the powers specified in this Act, all additional, implied and incidental powers which may be appropriate or necessary to carry out all the powers specified in this Act.
>
> .....

[56] The *EPC Act* states the electrical power policy of the province in s. 3. It obligates the Board to implement that policy as it carries out its duties and exercises its powers under the *PUB Act* and in so doing s. 4 requires the Board to apply tests which are consistent with "generally accepted sound public utility practice".

[57] In the *Stated Case* Green J.A. stated some of the general principles applicable to the interpretation of the *PUB Act* and *EPC Act* as follows:

[36] ...

1. The Act *(PUB Act)* should be given a broad and liberal interpretation to achieve its purposes as well as the implementation of the power policy of the province;

2. The Board has a broad discretion, and hence a large jurisdiction, in its choice of the methodologies and approaches to be adopted to achieve the purposes of the legislation and to implement provincial power policy;

3. The failure to identify a specific statutory power in the Board to undertake a particular impugned action does not mean that the jurisdiction of the Board is thereby circumscribed; so long as the contemplated action can be said to be "appropriate or necessary" to carry out an identified statutory power and can be broadly said to advance the purposes and policies of the legislation, the Board will generally be regarded as having such an implied or incidental power;

4. In carrying out its functions under the Act, the Board is circumscribed by the requirement to balance the interests, as identified in the legislation, of the utility against those of the consuming public;

5. The setting of a "just and reasonable" rate of return is of fundamental importance to the utility and must always be an important focus of the Board's deliberations; however, the "entitlement" of the utility to a just and reasonable rate of return does not guarantee it that level of return. The "entitlement" is to have the Board address that issue and to make its best prospective estimate, based on its full consideration of all available evidence, for the purpose of setting rates, tolls and charges.

6. The Board has jurisdiction, which will not generally be interfered with on judicial review, to make a determination of what is a just and reasonable rate of return within a "zone of reasonableness" and in so doing is not constrained in its choice of applicable methodologies, so long as they can be rationally justified in accordance with sound utility practice and are not inconsistent with the achievement of the purposes and policies of the legislation.

[58] Though the *Stated Case* concerned a utility's rate of return, the principles stated above, including those in sub-paragraphs 5 and 6, apply in a similar manner to the determination of rates for a utility's customers.

[59] The *EPC Act* requires that, wherever practicable, rates are to be established based on forecast costs – s. 3(a)(ii) – and utilizing tests which are consistent with "generally accepted sound public utility practice" – s. 4. The

rates policy stipulated in s. 3 of the *EPC Act* is consistent with the widely accepted principle of ratemaking that rates should be set prospectively, i.e., retroactive ratemaking should generally not be permitted. That principle and the distinction between retroactive and retrospective ratemaking were summarized recently in *Calgary (City) v. Alberta (Energy and Utilities Board)*, 2010 ABCA 132 ("*Atco Gas*") in the following paragraphs of the majority decision:

> [46] A brief overview of some central principles of ratemaking, including the related concepts of retroactive and retrospective ratemaking, is necessary. Generally, ratemaking and rates must be prospective: *Coseka Resources Ltd. v. Saratoga Processing Co.* (1981), 31 A.R. 541 at para. 29, 16 Alta. L.R. (2d) 60 (C.A.). A utility's past financial results can be used to forecast future expenses, but a regulator cannot design future rates to recover past revenue deficiencies: *Northwestern Utilities Ltd. and al. v. Edmonton*, [1979] 1 S.C.R. 684 at 691 and 699 ("*Northwestern Utilities*").
>
> [47] Retroactive ratemaking "establish[es] rates to replace or be substituted to those which were charged during that period": *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722 at 1749 ("*Bell Canada 1989*"). Utility regulators cannot retroactively change rates (*Stores Block* at para. 71) because it creates a lack of certainty for utility consumers. If a regulator could retroactively change rates, consumers would never be assured of the finality of rates they paid for utility services.
>
> [48] Retrospective ratemaking, in contrast, imposes on the utility's current consumers shortfalls (or surpluses) incurred by previous generations of consumers. It is generally prohibited because it creates inequities or improper subsidizations as between past and present consumers (who may not be the same). "[T]oday's customers ought not to be held responsible for expenses associated with services provided to yesterday's customers": Yvonne Penning, *"The 1986 Bell Rate Case: Can Economic Policy and Legal Formalism be Reconciled"* (1989), 47(2) U.T. Fac. L. Rev. 607 at 610. This is sometimes referred to as the problem of inter-generational equity (which the Board discusses at p. 12 of the Limitations Decision reproduced at para. 23).
>
> [49] Sometimes *retrospective* ratemaking is referred to as *retroactive* ratemaking. This is because rates imposed on a future generation of consumers, while prospective, create obligations in respect of past transactions, and in this sense they are retroactive: *City of Edmonton* at 402.

See also *Stated Case*, paragraphs 33 and 80.

[60] It is nevertheless clear from the authorities that the above noted principle of prospective ratemaking cannot bar the use of two widely used

regulatory tools authorized by applicable legislation though the same may be thought to have an element of retrospectivity. These two are interim rates and deferral accounts. See *Bell Canada v. Canada (Canadian Radio-television & Telecommunications Commission)*, [1989] 1 S.C.R. 1722 *(Bell Canada 1989); Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764 *(Bell Canada 2009)*.

[61] The power of the Board to authorize interim rates is granted in s. 75 of the *PUB Act*. That section allows the board to set rates expeditiously without full evidence and submissions, such rates being subject to review and possible modification in the final order of the Board, as is expressly provided for in subsections 75(2) and (3). Depending on the nature of the final order of the board it may have a retroactive or retrospective effect. In *Bell Canada 1989*, Gonthier J. stated:

> The statutory scheme established by the *Railway Act* and the *National Transportation Act* is such that one of the differences between interim and final orders must be that interim decisions may be reviewed and modified in a retrospective manner by a final decision. It is inherent in the nature of interim orders that their effect as well as any discrepancy between the interim order and the final order may be reviewed and remedied by the final order. I hasten to add that the words "further directions" do not have any magical, retrospective content. Under the *Railway Act* and the *National Transportation Act*, final orders are subject to "further [prospective] directions" as well. It is the interim nature of the order which makes it subject to further retrospective directions.
>
> (p. 1752)
>
> ...The underlying theory behind the rule that a positive approval scheme only gives jurisdiction to make prospective orders is that the rates are presumed to be just and reasonable until they are modified because they have been approved by the regulatory authority on the basis that they were indeed just and reasonable. However, the power to make interim orders necessarily implies the power to modify in its entirety the rate structure previously established by final order. As a result, it cannot be said that the rate review process begins at the date of the final hearing; instead, the rate review begins when the appellant sets interim rates pending a final decision on the merits. As was stated in *obiter* in *Re Eurocan Pulp & Paper Co. and British Columbia Energy Commission* (1978), 87 D.L.R. (3d) 727 (B.C.C.A.), with respect to a similar though not identical legislative scheme, the power to make interim orders effectively implies the power to make orders effective from the date of the beginning of the proceedings. In turn, this power must comprise the power to make appropriate orders for the purpose of remedying any discrepancy between the rate of return yielded by the interim rates and the rate of return allowed in the final

> decision for the period during which they are in effect so as to achieve just and reasonable rates throughout that period.
>
> (p. 1761)

[62] The statutory scheme of the *PUB Act* is to the same effect, as noted in the *Stated Case* as follows:

> [87] The scenario contemplated by Questions 3 & 4 is unlike the situation which arises where an interim order setting rates, tolls and charges is subsequently superseded by a final order, resulting in excess revenue being earned in the intervening period because the rates, tolls and charges charged in that period pursuant to the interim order were higher than those which were ultimately found to be justified in the final order. In that situation, if the final order is treated as being operative as and from the date of the interim order that was superceded, the final order will, indeed, have a retroactive effect. In the context of the Newfoundland legislation, that situation is specifically contemplated and authorized by s. 75(3) of the **Act**.

[63] The operation of deferral accounts is permissible under the existing regulatory scheme in this province regardless of whether it might be argued they incidentally have retrospective or retroactive effect. Deferral accounts are utilized in public utility regulation to deal with the effects of uncertain or volatile costs in a manner that ensures that rates are reasonable, not unjustly discriminatory and that the utility earns a just and reasonable return. They permit the recovery or rebate in a subsequent period of any deficiency or excess between forecast and actual costs. Regulatory regimes generally permit the operation of deferral accounts. See *Bell Canada 2009* at paras. 54-55; *Atco Gas* at paras. 33-44; *City of Edmonton v. Northwestern Utilities Ltd.*, [1961] S.C.R. 392 at p. 406. It was properly acknowledged by all parties that the *PUB Act* authorizes the utilization of deferral accounts. See *Stated Case* at paras. 93-98.

[64] In *Bell Canada 2009* the use of deferral accounts to ensure that rates return to a utility the actual - not forecast - costs,was held to preclude a finding of retroactivity or retrospectivity:

> [63] In my view, the credits ordered out of the deferral accounts in the case before us are neither retroactive nor retrospective. They do not vary the original rate as approved, which included the deferral accounts, nor do they seek to remedy a deficiency in the rate order through later measures, since these credits or reductions were contemplated as a possible disposition of the deferral account balances from the beginning. These funds can properly be characterized as encumbered revenues, because the rates *always* remained subject to the deferral

> accounts mechanism established in the Price Caps Decision. The use of deferral accounts therefore precludes a finding of retroactivity or retrospectivity. Furthermore, using deferral accounts to account for the difference between forecast and actual costs and revenues has traditionally been held not to constitute retroactive rate-setting (*EPCOR Generation Inc. v. Energy and Utilities Board*, 2003 ABCA 374, 346 A.R. 281, at para. 12, and *Reference Re Section 101 of the Public Utilities Act* (1998), 164 Nfld. & P.E.I.R. 60 (Nfld. C.A.), at paras. 97-98 and 175).
>
> (Emphasis added.)

[65] As stated, funds in a deferral account can properly be characterized as encumbered revenues as the rates are subject to the deferral account mechanisms established by the regulatory authority.

(b) The Regulatory Context

[66] This appeal concerns the legal authority of the Board respecting the disposition of amounts accumulating in a deferral account, Hydro's RSP, while interim orders were in effect from January 1, 2008.

[67] Final rates for the Industrial Customers were last approved by the Board in Order No. P.U. 8 (2007) effective January 1, 2007. In the same year final rates for Newfoundland Power were established by Order No. P.U. 11 (2007) effective July 1, 2007. In the following years prior to the next GRA under the current RSP Hydro would have been expected to make annual applications to the Board to reflect the appropriate RSP adjustments to the rates. As noted previously, for the Industrial Customers the RSP adjustment would take effect as of January 1st each year and for Newfoundland Power the adjustments would take effect as of July 1st each year.

[68] Those adjustments have not been made for the Industrial Customers since July 1, 2007. For the stated reason of needing to assess the effect of significant changes in Industrial Customer load, Hydro applied on December 20, 2007 for the continuation on an interim basis of the Industrial Customer rates then in effect. By Order No. P.U. 34 (2007) the Board approved the required interim rates for 2008. In December 11, 2008 Hydro again applied to the Industrial Customer rates over an interim basis in view of inevitable changes to Industrial Customer load consequent upon closure of a paper mill. By Order P.U. 37 (2008) the Board approved the continuation of the rates until March 31, 2009, and subsequently under Order No. P.U. 6 (2009)

the duration of the interim order was extended to June 30, 2009. In the meantime, Newfoundland Power's rates for its customers had been made final.

[69] On June 30, 2009 Hydro applied to have the existing Industrial Customer rates made final. It was at that point that the issue of whether the Board had the legal authority to change the manner of operation of the RSP to benefit customers, other than industrial customers, in prior years when those other customers' rates had already been finalized, arose.

(c) Standard of Review

[70] As this tribunal appeal is taken from orders of the Board directly to this Court, it is necessary to apply a standard of review analysis in accordance with the principles in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 and subsequent cases, to determine the scope of review that this Court may undertake.

[71] As *Dunsmuir* pointed out, it is not necessary to undertake a full standard of review analysis if prior "jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question" (paragraph 62). It is only when the inquiry into existing jurisprudence "proves unfruitful" that the court must proceed to a full analysis of the factors identified in *Dunsmuir* that make it possible to identify the proper standard of review.

[72] In the case of the Board, there is prior jurisprudence that has addressed the standard of review of Board decisions. In *Labrador City,* Cameron J.A. concluded on an application for leave to appeal, that the issues to be dealt with on the appeal, if leave were to be given (whether a common rate policy for electrical customers in Labrador was non-discriminatory; and whether the Board erred in failing to consider certain arguments submitted to it) should be reviewed on a standard of reasonableness. In like manner, in *Newfoundland Power*, Cameron J.A. held, on another application for leave, that an issue involving a contextual interpretation of a previous Board order, while involving a question of law, should nevertheless be reviewed on a standard of reasonableness. In both of these cases, the judge had to consider whether, as a condition of granting leave, the proposed appellant had a "reasonably arguable case" and in deciding that question, consideration should be given to the standard of review to be applied by the Court, if leave were granted, "in respect of the particular issues raised" (*Newfoundland Power*, paragraph 10; and *Labrador City*, paragraph 5).

[73] We do not consider the *Newfoundland Power* and *Labrador City* cases to be determinative of the issue of the standard of review in this case because: (i) they were decided before *Dunsmuir*; (ii) they are not decisions of a full panel; (iii) they were decided in the context of applications for leave to appeal, where the need for a definitive determination of the issue of standard of review was not directly engaged; and (iv) the issues being reviewed in those cases were dissimilar from the particular issues raised in the current case. They nevertheless remain of some assistance, insofar as they express views on the general structure of the legislation and the context in which the Board operates.

[74] Accordingly, it is necessary to engage in an analysis of the factors that have been identified in other cases to determine the proper standard of review (correctness or reasonableness) in this particular case.

[75] There are two statutory mechanisms whereby issues dealt with by the Board can be considered by this Court. They are contained in sections 99, 101 and 102 of the *PUB Act*:

> 99.(1) An appeal lies to the Court of Appeal from an order of the board upon a question as to its jurisdiction or upon a question of law ...
>
> 101. The board may of its own motion or upon the application of a party, ...state a case in writing for the opinion of the Court of Appeal upon a question which in the opinion of the board is a question of law and a similar reference may also be made at the request of the Lieutenant-Governor in Council.
>
> 102. The Court of Appeal shall hear and determine the question of law arising in a case stated under section 101 and remit the matter to the board with the opinion of the court attached.

[76] In matters brought before the Court under both s. 99 and s. 101, the focus is on considerations involving "a question of law". In s. 99, there is the additional focus on "a question as to [the board's] jurisdiction" but that is a specialized form of legal question as well. In references under s. 101, in which the Court's opinion is sought on questions of law, the Court is obligated, pursuant to s. 102, to provide its own view on what it considers to be the "correct" answer to the question posed, as was done in the *Stated Case*. By enacting ss. 101 and 102, the legislature has determined it appropriate for the Board to defer to the Court's opinion on questions of law, rather than the Court deferring to the expertise of the Board in determining those types of questions.

[77] On an appeal brought under s. 99 where the focus is also on "a question of law", the question arises as to whether the same standard for determining questions of law should be applied or whether something more restrictive – involving a degree of deference to the original decision-maker – should be employed. On one viewpoint, it could be said that if the legislature intended, in its similar characterization of the types of questions that could be raised under s. 99 and s. 101, that there should be more deference accorded under s. 99, it could have said so, but it did not. On the other side, it could be said that the process under s. 99 is different, involving as it does, a challenge to decisions of the Board that the Board believes are correct and does not involve the Board itself questioning its own view. In such situations, more deference might be justifiable.

[78] That said by way of preliminary observation, it is now necessary to turn to a consideration of the "contextual guideposts" (per Fish J. in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616 at paragraph 41) that are to be applied to assist in determining the scope of review. The basic factors to consider were re-iterated in *Dunsmuir* to include: (i) the presence or absence of a privative clause; (ii) the purpose of the tribunal as determined by interpretation of its enabling legislation; (iii) the nature of the question at issue; and (iv) the expertise of the tribunal (paragraph 64). These factors are non-exhaustive: *Nor-Man* at paragraph 40.

[79] It should be noted at the outset that the contextual factors are designed to assist in determining the intention of the legislature as to the intended scope of review. In the end, what is sought is to discern whether the legislature intended to limit the degree of scrutiny of the tribunal's decision by the court.

[80] Turning to the first guidepost – the presence or absence of a privative clause – the restriction placed by s. 99 on the Court by limiting appeals to questions of jurisdiction and law and effectively excluding appeals respecting factual matters and inextricably intertwined questions of mixed law and fact is effectively a privative clause regarding those factually-related matters. On the other hand, inasmuch as the legislation allows appeals on jurisdiction and law, it is not a privative clause in respect of those matters.

[81] In *Barrie Public Utilities v. Canadian Cable Television Association*, 2003 SCC 28, [2003] 1 S.C.R. 476 at paragraph 11, Gonthier J., for the majority , observed that: "While the presence of a statutory right of appeal is not decisive of a correctness standard ... it is a factor suggesting a more

searching standard of review". See also, Michel Bastarache, "Modernizing Judicial Review" (2009), 22 C.J.A.L.P. 227 at p. 234. It must also be recognized, however, that the absence of a privative clause does not necessarily lead to the conclusion that a high level of scrutiny is necessarily intended "where other factors bespeak a low standard" (*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998]1 S.C.R. 982, per Bastarache J. at paragraphs 30, 37). That said, in the context of the legislative scheme involved in this case, this first factor, considered alone, points towards a correctness standard rather than a deferential one on issues of law and jurisdiction.

[82] As to the second guidepost – the purpose of the tribunal – Cameron J.A. observed in *Labrador City* that:

> [17] The Board is comprised of full and part-time members who have different backgrounds. This would include engineers and accountants, for example. It has a professional staff. Its role is a many-faceted one, including the supervision of all public utilities and the regulation of rates, tolls and charges. Policy, both that imposed by legislation and that developed by the Board, plays a major role in the Board's performance of its duties. Some of those policies are developed over time. There can be no doubt that the Board is a specialized tribunal with expertise in matters related to the regulation of electrical utilities. In questions related to the determination of rates, which involve the application of industry practice, the Board is clearly in a position superior to that of the Court. This would suggest a more deferential standard of review.
>
> ...
>
> [19] ... The *Public Utilities Act* and the *Electrical Power Control Act, 1994* provide a scheme for the regulation of electrical utilities which requires the Board to address policy issues and to balance interests. They operate in tandem. This factor suggest[s] a more deferential standard to the Board's decisions.

These observations are equally applicable today. I would add the caveat, however, that the deference to be shown is in relation to the area that is entrusted to the Board for regulation and where the Board's superior expertise in the understanding, development and application of policy and the application of regulatory legal standards and balancing of interests exists.

[83] In *Council for Licensed Practical Nurses v. Walsh*, 2010 NLCA 11 Welsh J.A. at paragraph 11 pointed out that the existence of a right of appeal does not automatically mean that a standard of correctness will apply where the nature of the question (in *Walsh*, one of mixed law and fact) engages the

expertise of the tribunal. That brings us to the two remaining factors to be considered: nature of the issue and tribunal expertise.

[84] With respect to the third factor – the nature of the issue – it is important to appreciate that "different standards of review will apply to different legal questions depending on the nature of the question to be determined and the relative expertise of the tribunal in those particular matters." (per Major J. in *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2011 SCC 36, [2001] 2 S.C.R. 100 at paragraph 27.

[85] It is now recognized that deference should be shown to many types of tribunal decisions even though they involve a question of law. This is especially so where a specialized tribunal, in the course of carrying out its statutory duties, is interpreting its "home statute" within its area of expertise. See, *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, per Fish J. at paragraph 37; *Celgene Corp v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3 per Abella J. at paragraph 34. In fact, in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* 2011 SCC 61, [2011] 3 S.C.R. 654, Rothstein J., writing for the majority, went so far as to say, at paragraph 39, that: "[w]hen considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness."

[86] That said, there must remain, if the rule of law is to be given effect, an area where a statutory delegate must be required to make decisions that, on review by the superior courts, must be correct. In *Alliance Pipeline*, Fish J., writing for a majority of eight, identified the following areas where correctness still has application:

> [26] ... The standard of correctness governs: (1) a constitutional issue; (2) a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'" ...; (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a "true question of jurisdiction or *vires*" ...

[87] In the *Alberta Teachers' Association* case, the Supreme Court again recognized that the principle that deference will be shown to tribunal decisions interpreting their home statutes applies "unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply" (paragraph 30), i.e. the four categories identified by Fish J. in *Alliance Pipeline*.

[88] *Alberta Teachers' Association* also stresses that the category of "true questions of jurisdiction or *vires*" is a very narrow one (paragraph 33) and that Courts should not be too quick to brand a legal question as jurisdictional and thereby revert to the interventionist attitudes towards judicial review that obtained prior to *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227. Rothstein J. explained:

> [34] The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on a particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction... [I]t is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity", should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[89] Nothing written in *Alberta Teachers' Association* has eliminated true questions of jurisdiction or *vires* – narrow though that category may be – as attracting a correctness standard of review. The real question is what in essence constitutes a true question of jurisdiction or *vires*? Although Rothstein J. confessed in *Alberta Teachers' Association* that he was "unable to provide a definition of what might constitute a true question of jurisdiction" (paragraph 42), reference to *Dunsmuir* is nevertheless helpful. There, Bastarache and Lebel JJ. stated:

> [59] ... "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction.

[90] In the instant case, it was the Board that determined that before it could hear Hydro's rate application (something that was clearly within its jurisdiction to hear) a "preliminary hearing" had to be held to determine the question set out previously in paragraph 32 of this decision. The formulation specifically raised the question:

> Does the Board have *jurisdiction* to issue an order which changes how the Rate Stabilization Plan (RSP) operated before the date of the order and, if so, does this

> *jurisdiction* extend to any aspect of the operation of the RSP, including the rate charged to customers, the determination of the balance(s) in the RSP, and how these balances are allocated to customers or customer classes?
>
> (Emphasis added.)

[91] In its Decision, the Board described the preliminary hearing as follows:

> The preliminary hearing was held to receive submissions from the parties on the question of whether the Board has the *jurisdiction* to change the manner in which the RSP operated, including the rates charged, the determination of the balance(s) in the RSP and how these balances are allocated to customer classes. This question of *jurisdiction* is raised in the context of the interim orders issued by the Board for Industrial Customer rates since December 2007.
>
> (Emphasis added.)

[92] The parties at the preliminary hearing divided as to whether the Board had legal authority to make an order dealing with the money in the RSP that would include residential customers, as well as industrial customers, as beneficiaries. The Board described the difference as follows:

> All parties agree that the Board has the *jurisdiction* to set final rates for the Industrial Customers as of January 1, 2008. Hydro, Newfoundland Power and the Consumer Advocate submit that, in establishing those rates, *the Board also has jurisdiction* to deal with the manner of how those rates, and in particular the RSP rates, are calculated as of the date of any interim order, including the disposition of any balances in the RSP arising. The Industrial Customers submit that *s. 75 of the Act only allows the Board to set interim rates* and that the rules and regulations affecting those rates cannot be made interim. The Industrial Customers argue that the Board's *jurisdiction* with respect to the disposition of any balances in the RSP is confined to the existing RSP rules and regulations.
>
> (Underlining added.)

Noting that the RSP was a type of "deferral account", the Board approached this issue by reference to, amongst other things, the scope of the authority granted by s. 75 of the *PUB Act*, as well as the underlying principles of utility regulation, derived in part from this Court's decision in the *Stated Case* as well as other jurisprudence.

[93] The Board's conclusions, reproduced in paragraph 43 of this decision, were also stated in jurisdictional terms. In particular, note is taken of the statement, "... *the Board does not have jurisdiction* to change how the

Newfoundland Power RSP operated in prior years, either in terms of the rates charged or the resulting balances" (Italics added.). While it is true that in the elaboration of its reasons leading to this conclusion the Board purported to rely on underlying principles and policies of utility regulation – matters with which it has great familiarity and some expertise – in the end the conclusion reached was that the Board had no jurisdiction, in the sense of legal authority, to distribute deferral account balances, and in particular the RSP in question, to customers other than industrial customers or to otherwise benefit them in the context or orders setting interim rates.

[94] We agree with counsel for Newfoundland Power, who submitted:

> The issue that the Board stated for itself was a true question of jurisdiction or *vires*. It engaged the question of what the Board had the legal power and authority to do, not what the Board should do as a matter of regulatory judgment and decision-making. The issue was engaged on a preliminary hearing before the Board proceeded to a hearing on the merits.
>
> (Paragraph 122, Newfoundland Power's Factum.)

[95] If the Board is incorrect on this issue, its decision in effect would amount to declining to exercise an authority it has by law (i.e. a "wrongful decline of jurisdiction", as referred to by Bastarache and Lebel JJ. in *Dunsmuir*, quoted above). The result, if incorrect, would be the shutting out of a large class of power consumers from the benefits of the legislative scheme being administered by the Board. The issue, therefore, of the authority of the Board to benefit customers other than industrial customers through regulating a deferral account like the RSP under s. 75 in the context of interim orders has all the hallmarks of a true question of jurisdiction.

[96] In *Milner Power Inc. v. Alberta (Energy and Utilities Board)*, 2010 ABCA 236, which dealt with a statutory appeal from a decision of the Alberta Energy and Utilities Board on questions of law and jurisdiction, the court confirmed that despite the general expertise of the Board and regulatory purpose of the legislation, the "key factor" was the nature of the questions raised on the appeal (whether the Board should have referred to investigate and hold a hearing into a complaint and, instead, summarily dismissed it). The court concluded that the question of law relating to the right of the Board to refuse to investigate or hold a hearing was an important question of law that did not engage the specialized expertise of the Board. The Court stated:

> [29] ... [T]he legislation provides for a right of appeal on questions of law and, in our view, because this is a question of the proper interpretation of the Board's right to refuse to act on a complaint, the Board must be correct.

[97] In similar manner in the instant case, because this is a question of the proper interpretation of the Board's right to decline, according to law, to deal with a deferral account, in the context of interim rates, for the benefit of certain classes of customers, the Board should also be correct because the matter involves the jurisdiction of the Board.

[98] Counsel for the Board submitted, however, that a key consideration differentiating the Board's decision in this case from a true question of jurisdiction is the statutory direction in the *Electrical Power Control Act, 1994*, s. 4 to apply "generally accepted sound public utility practice" to the implementation of the power policy of the province, something that falls within the expertise of the Board. That argument, however, has no application to the issue in this case. This is not a case where the Board purported to make a determination that, as a matter of sound public utility practice, it *should not* exercise its powers in a certain way; rather, it is a case where the Board purported to determine that it *could not* do so.

[99] To determine whether the Board *could* exercise its authority in the circumstances of this case, the Board had to interpret s. 75 in light of the underlying principles of utility regulation (such as the principle against retroactivity). There is nothing in s. 75 of a technical nature that requires the Board's expertise in its construction. Indeed, the underlying principles which the Board purported to apply are those which were pronounced upon by this Court in the *Stated Case*. As noted previously, the results of stated cases brought under s. 101 require the Board to defer to the view of the Court rather than the other way around. That would include the Court subsequently pronouncing on the meaning of what it said in earlier jurisprudence. The Court is therefore in as good a position as the Board to determine the scope of s. 75 insofar as it confers legal authority on the Board.

[100] In *Bell Canada 1989*, which involved a statutory appeal from the Canadian Radio-Television and Communications Commission to the Federal Court of Appeal on questions of law or jurisdiction, where the issues, as ultimately stated by the Supreme Court of Canada, were whether the Commission had the "legislative authority" to review revenues made by Bell Canada during a period when interim rates were in force and whether the Commission had "jurisdiction" to make an order compelling Bell to grant a one-time credit to its customers, the Court, recognizing that deference

should be given to the Commission's decisions on issues which fell within its area of expertise, nevertheless held that the issues at play were jurisdictional and were not within the Commission's area of expertise. Gonthier J. explained at p. 1747:

> In this case, the respondent is challenging the appellant's decision on a question of law and jurisdiction involving the nature of interim decisions and the extent of the powers conferred on the appellant when it makes interim decisions. ... It is ... a question of jurisdiction because it involves an inquiry into whether the appellant had the power to make a one-time credit order.
>
> Except as regards the choice, amongst remedies available to the appellant, of the most appropriate remedy to achieve the goal of just and reasonable rates throughout the interim period, the decision impugned by the respondent is not a decision which falls within the appellant's area of special expertise ...

[101] The decision in the foregoing case can usefully be contrasted with *Bell Canada 2009* where the issue was the appropriateness of the manner in which the Commission exercised its rate-setting jurisdiction in directing the allocation of certain funds to various purposes. In that, case, unlike the earlier *Bell Canada 1989*, the question was not whether the Commission had the legal authority to order certain dispositions but whether its choice of methodology was appropriate, something the Court held was at the "core" of the Commission's specialized expertise. As a result, a deferential standard of review was employed.

[102] The instant case is more akin to the 1989 decision. Here, the core of the dispute is the Board's decision that it did not have the jurisdiction, or legal authority, to allocate balances accrued under RSP rules to other classes in circumstances where industrial customers' rates were interim.

[103] We conclude, therefore, that the issue before the Board, as stated in its decision to hold a preliminary hearing, in the arguments made at the hearing, in the Board's formulation of the issues in its Decision and in the conclusions it reached, was a true question of jurisdiction and should be reviewed on a standard of correctness.

[104] There is, of course, a fourth factor to be considered – the expertise of the Board. However, in light of the conclusion reached above, little more need be said. As noted in *Barrie Public Utilities*, "The proper concern of the reviewing court is not the expertise of the decision-maker in general, but its expertise relative to that of the court itself *vis-à-vis* the particular issue" (per Gonthier J. at paragraph 12).

[105] There is certainly little doubt that the Board is regarded as a specialized tribunal with expertise in the area of regulation of electrical utilities and the establishment and approval of rates, tolls and charges. As noted in the *Labrador City* case, the legislative scheme requires the Board to develop and apply policy in the course of its work. Further, s. 6 of the *PUB Act* requires the Lieutenant-Governor in Council, when making appointments to the Board, to "take into consideration the need of the board to be composed of commissioners who have expertise in law, engineering, accountancy and finance." It is clear that the legislature intended the Board to be a tribunal with specialized expertise within the field of its legislative mandate.

[106] As pointed out in the *Bell Canada 1989* decision, however, the Board is not to be regarded as superior to the Court in respect of questions of a true jurisdictional nature. With respect to the issues engaged in this appeal, therefore, the fact that the Board is a specialized tribunal within the area of its mandate does not call for deference to its decisions relating to true jurisdictional matters.

[107] Taking all factors together, there should be appellate review of the Decision on a correctness standard.

(d) The Board's Approach

[108] In the context of an application by Hydro that previously-approved interim rates for certain industrial customers be made final, the Board determined that, by way of preliminary hearing, the parties should first address whether the Board had "jurisdiction to issue an order which changes how the ... RSP operated before the date of the order and, if so, does this jurisdiction extend to any aspect of the RSP, including ... how these balances are allocated to customers or customer classes."

[109] The Board appeared to be concerned, amongst other things, that a change to the RSP that could involve customers, other than industrial customers, potentially benefiting from any change in the RSP rules even though those other customers' rates were, for the relevant period, no longer interim, was not permissible. The Board was also concerned with whether exercising such a jurisdiction, if it existed, might offend the presumption against retroactivity.

[110] The Board described the position of Hydro, Newfoundland Power and the Consumer Advocate as follows:

> Hydro, Newfoundland Power and the Consumer Advocate submit that, in establishing these final rates, the Board also has the jurisdiction to deal with the manner of how those rates, and in particular the RSP rates, are calculated as of the date of any interim order, including the disposition of any balances in the RSP arising.
>
> (p.7)

[111] By contrast, the Industrial Customers took the position, in the view of the Board, that although the Board could set interim rates, "the rules and regulations affecting those rates cannot be made interim" and that "the Board's jurisdiction with respect to the disposition of any balances in the RSP is confined to the existing RSP rules and regulations". Put another way, it meant that the balances in the RSP could not be distributed to anyone other than the Industrial Customers under the guise of making interim rates for Industrial Customers final when other customers' rates had already been made final.

[112] The Board restated the "fundamental question" as follows: "how an established deferral account, such as the RSP, should be treated by the Board in the context of interim orders affecting the balances in the account" (p.7)

[113] The Board's approach to the questions it had posed for preliminary decision essentially involved a consideration of three matters:

1. The nature of deferral accounts generally and how they could be disposed of;

2. The impact of interim decision-making on the disposition of deferral accounts;

3. The impact of how, procedurally, the issue had been brought before the Board.

Although interrelated, it is necessary to consider each of these matters in turn. In fact, the procedural issues in item three cut across the Board's consideration of the other two items as well.

(i) Deferral Accounts

[114] A deferral account in utility regulatory practice is an accounting practice whereby a separate account is used to

> [54] ... "[e]nable a regulator to defer consideration of a particular item of expense or revenue that is incapable of being forecast with certainty for the test year". They have traditionally protected against future eventualities, particularly the difference between forecasted and actual costs and revenues, allowing a regulator to shift costs and expenses from one regulatory period to another.
>
> (Bell Canada 2009.)

[115] As discussed previously, use of such accounts helps to smooth out the occurrence of unexpected or currently unknown costs or revenues and to provide rate stability to customers. Deferral accounts are regarded as "accepted regulatory tools" to be operated as part of rate-setting powers: *Bell Canada 2009*, paragraph 54. As noted earlier, the proper use of deferral accounts does not involve violation of the principle against retroactivity or retrospectivity.

[116] Implicit in the creation of deferral accounts is the power of the regulator to order the disposition of the funds contained in them: *Bell Canada 2009*, paragraph 56. In *Bell Canada 2009,* for example, the Supreme Court held that deferral account balances representing the difference between certain telephone rates actually charged by local exchange carriers and those determined by a price-cap formula ordained by the regulator could be used to expand high-speed broadband internet services in remote and local communities, to improve accessibility for individuals with disabilities and to give a one-time credit to certain residential subscribers.

[117] The Board determined that the RSP was a form of deferral account because it "allows for the accumulation of balances which are subsequently collected from or refunded to customers". This determination was accepted by all parties.

[118] The RSP is arguably more complex than the normal type of deferral account such as the one which was the subject of discussion in *Bell Canada 2009*. In that case, the deferral account was used to record the difference between the revenues derived from certain residential telephone services that were actually charged, and the revenues that would otherwise have been derived from rates determined by a "price caps" formula designed to limit prices in accordance with inflation. In the instant case, however, the amount that accumulates in the RSP is determined by a number of factors, some of which may work against others in their ultimate effect. The amounts that accrue result not only from increases or decreases in cost – which could be said to relate to only the Industrial Customers operations – but also from

increases or decreases in load variation. In fact, this factor swamps the other factors in terms of magnitude.

[119] The Board, correctly, concluded that the use of deferral accounts is "consistent with prospective regulation" and does not violate the anti-retroactivity principle (p. 7). However, it went on to state that although it had "jurisdiction" in relation to deferral accounts, the use of such accounts is "an extraordinary measure" and that its jurisdiction was "limited by the principles of predictability and fairness ... and does not necessarily extend to changing how balances are calculated and allocated in the past" (p. 8; underlining added).

[120] It is apparent that in the foregoing passages, the Board is commingling two different concepts. The first reference to "jurisdiction" is to the existence of a legal authority for the establishment of deferral accounts. This is a correct use of the notion of jurisdiction. The second reference, on the other hand, is to the manner in which the jurisdiction, or authority, should be exercised – as an extraordinary measure, limited by certain rate-making principles, etc. This analysis does not go to the notion of jurisdiction, as legal authority, but to the manner in which the jurisdiction is to be exercised. This is evident from the observation of the Board that the use of deferral accounts does not "necessarily" extend to changing how balances were allocated in the past, thereby recognizing that these principles do not define the jurisdictional parameters of the operation of deferral accounts but would merely have an influence on the decision, in a given case, as to how a deferral account should be regulated.

[121] By intruding into the area of how the Board's jurisdiction with respect to the operation of a deferral account should be exercised, in the context of an examination of the true jurisdictional question it posed for itself, the Board committed legal error.

[122] In support of its analysis, the Board then referred to past practice of the Board. It stated at p. 8:

> While the Board acknowledges that the RSP has been used creatively over the years to address a variety of issues it is also clear that changes to the established RSP rules have always been made on a prospective basis.[1]

[1] In support of this proposition, the Board cited a portion of Hydro's written submission to the Board, as follows:

> Barring an intervening order of the Board, which can be either a final order changing the way the collection or disbursement of amounts occur through rate setting of for future energy

While past Board practice may be relevant as to how the Board ought to exercise its jurisdiction in a given case, it cannot be used to determine the jurisdictional parameters of the legal authority which the Board has. In relying on past practice in this regard, the Board erred in its analysis.

[123] The Board then stated a conclusion which obviously drew upon its previous conclusions about exercising its jurisdiction only in "extraordinary" circumstances, not "necessarily" changing how balances were calculated or allocated in the past, and about the influence of past practice:

> In the Board's view changing how the RSP operated in prior years would be analogous to the situation that Mr. Justice Green suggested might constitute retroactive regulation in [the *Stated Case*]
>
> (p. 9)

Because the premises supporting this conclusion are, for the reasons given above, not valid when dealing with the jurisdiction of the Board to deal with deferral accounts, as opposed to the question of how that jurisdiction should be exercised in a given case, the conclusion that changing how the RSP operated in prior years might amount to retroactive regulation is severely weakened.

[124] Furthermore, it was of questionable utility for the Board to have stated this conclusion at this stage in its analysis, when it was only commenting on deferral accounts without reference to the effect of interim orders. The questions posed by the Board, set out in paragraph 32 above, were meant to address the Board's power of disposition over balances in the RSP which accumulated during the currency of interim orders. A conclusion that the RSP, as a deferral account, could not be changed relative to its operation in prior years, without considering the fact that what was being dealt with was in the context of interim orders, was therefore premature. We will come back to the issue of interim orders later in these reasons.

> consumption, or an interim order signaling a potential change in the rate for consumption that occurs after the interim order is issued, the customer can expect to rely upon the rate structure to provide an outcome which will be calculated in manner which has already been set.

This statement does not in fact support the Board's statement in the text. Hydro's submission contained the relevant qualification that the general proposition would not be applicable if there had been an interim order. It was therefore illogical for the Board to offer Hydro's statement as support when it was qualified by the reference to an interim order, clearly applicable to the matter under consideration.

[125] Finally, in the context of its discussion of deferral accounts, the Board made reference to a procedural consideration which appeared to affect its jurisdictional analysis.

[126] The Board noted that Hydro's applications for the interim rates for its Industrial Customers and its 2009 GRA had not sought any changes to the RSP rules, nor had Hydro filed any application for RSP reviews prior to the end of 2009 as had been indicated in the covering letter to its 2009 application. In the absence of an application, the Board declined "to consider suspending the operation of the load variation allocation rules as suggested by Hydro in its correspondence" (p. 9).

[127] The phraseology of that portion of the decision suggests that either the Board believed it could not act on that matter without an application or that the absence of an application was a sufficient reason for the Board not to exercise its jurisdiction. It is not clear which. With respect to the first possible interpretation, in our view the *PUB Act*, including s. 82, confers broad powers upon the Board to investigate rates and take remedial action if appropriate. Exercise of such powers is not dependent upon receipt of an application. Procedure cannot determine jurisdiction. It may affect its exercise but not its existence. With respect to the second interpretation of the Board's statement we consider the statement to be conclusory only, lacking an explanation of why the stated factor would be sufficient.

(ii) Interim Orders

[128] Section 75 of the *PUB Act* gives broad powers to the Board to make orders approving rates, tolls and charges on an interim basis until a final order of the Board is made. When made, the final order is treated as having been made as of the date of the interim order: *Stated Case*, paragraph 87. If therefore, the rates, tolls and charges collected pursuant to the interim order were higher than those finally approved, it is necessary to deal with the excess that, in accordance with the final order, should not have been collected.

[129] Subsection 75(3) provides, in broad terms, that the Board may order that excess revenue earned pursuant to an interim order be dealt with, not only by refunding it to the customers of the public utility concerned, but also by placing it in a reserve fund "for the purpose that may be approved by the board." This provides considerable flexibility to the Board to dispose of excess revenue earned as a result of an interim order, that is not confirmed in

the final order, in a variety of ways that may or may not involve the customers of the utility who contributed to the excess benefiting directly through a refund. As was noted in the *Stated Case*, "[t]he Board has a broad discretion, and hence a large jurisdiction, in its choice of the methodologies and approaches to be adopted to achieve the purposes of the legislation and to implement provincial power policy" (paragraph 36, item 2). In so doing, the Board must "balance the interests, as identified in the legislation, of the utility against those of the consuming public" (paragraph 36, item 4).

[130] Indeed, as noted in the *Stated Case*, paragraph 94, "[t]he power to deal with excess revenue is inherent in the nature of the regulatory scheme the Board is required to administer" even if there is no express statutory provision dealing with the type of excess revenue under consideration. The manner in which the Board can deal with excess revenue is limited only by the broad purposes of the legislative regime as it is perceived by the Board to apply in a given case.

[131] The Board rejected the submission of Hydro, with the support of Newfoundland Power and the Consumer Advocate, that, as the Industrial Customers had been subject to interim orders since January 1, 2008 under s. 75 of the *PUB Act*, the Board's power to determine the appropriateness of rates since January 1, 2008 included the power to determine the disposition of any accumulated balance in the RSP on a prospective basis to all customer groups, not just the Industrial Customers. Instead, the Board accepted the argument of the Industrial Customers that, although the rates applicable to the RSP could be changed back to the date of the last interim order, the balance in the RSP attributed to the Industrial Customer group had to be distributed only for the benefit of that group.

[132] In *Bell Canada 1989*, Gonthier J. stated at p. 1761:

> The underlying theory behind the rule that a positive approval scheme only gives jurisdiction to make prospective orders is that the rates are presumed to be just and reasonable until they are modified because they have been approved by the regulatory authority on the basis that they were indeed just and reasonable. However, the power to make interim orders necessarily implies the power to modify in its entirety the rate structure previously established by final order.
>
> (Emphasis added.)

[133] The Consumer Advocate relied on this passage to submit that if the Board is dealing with interim rates, the whole rate structure is "up for revision". The Board stated that it accepted the proposition in *Bell Canada*

1989 that "the power to make interim orders necessarily implies the power to modify in its entirety the rate structure previously established by final order" but interpreted that proposition restrictively:

> ... The Board does not believe that an interim rate order for one group of customers empowers the Board to change the utilities' entire rate structure. This interpretation would not be in keeping with the principles of predictability and fairness cited by the Alberta Court of Appeal in the 2010 ATCO decision or with the specific language of the Supreme Court of Canada in [Bell Canada 1989] where the Court states at para. 39:
>
> > "Thus, the question before this Court is whether the appellant has jurisdiction to make orders for the purpose of remedying the inappropriateness of rates which were approved by it in a previous interim decision."
>
> (p. 11; Emphasis added.)

[134] The above passage from *Bell Canada 1989* referenced by the Board was part of a paragraph in which Gonthier J. was describing the matter that was then before the Supreme Court of Canada and it should not be taken as a legal proposition that the powers of a regulatory authority in the context of interim orders are limited to that single defined situation. The propositions stated by Gonthier J. after a review of the applicable legislation and authorities are the legal principles established by *Bell Canada 1989* respecting the powers accruing to a regulatory authority which is authorized to make interim orders – see paragraph 61 above. In restrictively interpreting the general principles enunciated in *Bell Canada 1989* as it did, the Board erred.

[135] In like manner, the Board interpreted s. 75 restrictively to enable it to reject the proposition advanced by the Consumer Advocate that s. 75, by its language, allowed the Board, in its words, "to place any excess revenue paid by the Industrial Customer group as a result of the interim rates into an account for the possible benefit of [some] other customer group" (p. 11). The Board reasoned as follows:

> ... This interpretation would not appear to be consistent with the scheme of the legislation generally or with generally accepted sound public utility practice which requires that rates be just and reasonable and not unjustly discriminatory.
> ...

> Reading s. 75 in the overall context of the legislation and regulatory structure the Board believes that a purposeful interpretation would require that the refund or the reserve fund must, to the extent possible, be for the benefit of the customer group which was found to have paid the excess revenue. There may be times when it is not practical to refund to the customers that paid the excess, for example where the amount is nominal or the customers cannot be found. The Board believes that, in the absence of extraordinary circumstances, a finding that interim rates for a group of customers were in excess of reasonable rates would require that the same customer group be effectively charged the reasonable rates through a refund or the use of a reserve account.
>
> (pp. 11-12)

[136] In this passage the seeds of error are evident. Although commencing to interpret s.75 in accordance with the scheme of the *Act* and basic principles of utility regulation with a view to determining whether it had the legal authority to do what Hydro, Newfoundland Power and the Consumer Advocate submitted it *could* do, the Board's analysis morphed into determining what it *should* do in accordance with sound utility practice. This is evident from the conclusion that there "may be times when it is not practical to refund to the customers that paid the excess", thereby recognizing that other groups could in "exceptional circumstances" benefit. This analysis recognizes the Board was determining its jurisdiction according to what it considered, as a general rule, it *should* do, in a given case, not what it had, as a matter of law, authority to do.

[137] Noting that Newfoundland Power's rates had already been made final, the Board nevertheless concluded that s. 75 "does not ... contemplate a wholesale review of the rate structure of all the customers of the utility where only one group of customers has interim rates" and that "[t]his is the only reading ... which is consistent with fair and reasonable rates and the principles of predictability and fairness" (p. 12). While this might be an appropriate result in a given case, it does not follow that such an interpretation is the "only" appropriate reading. As the Board itself noted, there may well be circumstances where it would not be appropriate or possible to benefit only the group who paid the excess revenue. The Board has to have the authority to make other dispositions of that revenue. Its jurisdiction must therefore extend to such situations.

3. Procedural Considerations

[138] Reference has already been made to how the Board's perceptions of how the matter came before it procedurally appeared to affect the Board's jurisdictional analysis. See, paragraphs 125-127 above in relation to deferral

accounts. The Board also gave consideration to what it considered to be procedural problems when dealing with its analysis relating to interim orders.

[139] The Board placed great emphasis in its analysis on the fact that Hydro had not, in its applications for interim rates for the Industrial Customers, requested changes to the RSP rules or refunds of excess revenue to other customer groups:

> In its applications for interim rates for the Industrial Customers, Hydro did not request changes to the RSP rules and did not ask that any excess revenue be refunded to the benefit of other customer groups.
>
> (p. 12)
>
> The interim rate applications put the Industrial Customers on notice that the Board would be reviewing the Industrial Customers rates for reasonableness and that it may set different rates and a different method of calculating the Industrial Customers' RSP balances and rates. Hydro did not provide notice that anyone other than the Industrial Customers may be affected and did not put the Industrial Customers on notice that the accumulating balances in the RSP may be transferred to the benefit of other customer groups. The potential for a review of Hydro's rate structures or that any excess revenue as a result of the interim rates could be put to the benefit of other customer groups was not made clear. This result would not be consistent with the historical operation of the RSP and would be unprecedented in the context of an interim rate order in this province and therefore could not reasonably have been anticipated by the Industrial Customers.
>
> (p. 13)

[140] Accepting the foregoing paragraph as factually correct, its significance in our view was not properly explained. There was no finding that the Industrial Customers had to date suffered any actual detriment owing to the absence of prior notice of the possible disposition of the RSP balance other than for their exclusive benefit. The observation that Hydro's current proposal is unprecedented may be pertinent but of itself is of no significance on the jurisdictional issue. The jurisdictional issue cannot be resolved by reference to past practice or procedural issues of notice. References to sound utility practice may be relevant to making a decision within jurisdiction but not to whether jurisdiction exists in the first place.

[141] The Board did accept that it has the power to modify the entire rate structure for the Industrial Customer Group, including the RSP rules. It stated:

> The interim orders clearly provide the Board with the full jurisdiction to, in the words of the Supreme Court of Canada, "*modify in its entirety the rate structure*" for the Industrial Customer group, which includes all aspects of the Industrial Customers' rate, including the RSP rate. The Board does not accept the position of the Industrial Customers that the Board has no power to change the rules and regulations affecting the RSP. The Industrial Customers argue that because there is one set of RSP rules which apply to both the Industrial Customers and Newfoundland Power and because there was no interim order in relation to Newfoundland Power then the rules could not have been made interim. The Board notes, as referenced by the Consumer Advocate, that the Industrial Customers' rate sheet specifically states that the RSP adjustment reflects the operation of the RSP. The Board agrees with Hydro when it states *"The RSP rules are just a means of calculating a rate. That's their only role*." (Transcript, June 12, 2010, pg.32 18/7-8) The Board finds no distinction between the rates and the RSP rules used to calculate the rates.
>
> The Board finds that it has the jurisdiction to set reasonable rates for the Industrial Customers for the period beginning on January 1, 2008 but it does not have the jurisdiction to make a comprehensive assessment of the reasonableness of Hydro's entire rate structure. Had there been an application for a change to the RSP along with an application for interim rates for Hydro's other customers or a request that any excess go to the benefit of other customer groups the Board may have taken a different view of the Application. ...
>
> (p. 13; Underlining added.)

[142] The Board was obviously concerned that the issue of the disposition of the RSP account should have been brought before it by Hydro in a different manner and at an earlier time. It stated:

> The Board is frankly disappointed with Hydro's handling of this matter, both substantively and procedurally. Hydro was in the best position to know the impacts of the anticipated significant load changes. Major changes in load will not only impact the operation of the RSP but may also potentially impact significantly the cost of service and base rates that were set in the last general rate application. The Board would expect that, in light of such major changes from test year forecasts and the resulting impact on Industrial Customer rates, Hydro would have filed a general rate application. Such major changes could only have been addressed through a general rate application or, alternatively, perhaps an application which sought a review of its rate structure, changes to the RSP and interim rates for all potentially affected customers. Such an application should have set out specific proposals in relation to the excess so that all affected customers understood what was at stake. In addition, the Board would have expected Hydro to address these load changes promptly to avoid the complications which have now arisen as a result of the passing of two years. Hydro failed to take timely appropriate steps in the circumstances so that the

> matter could be effectively addressed, ensuring that all stakeholders understood the issues.
>
> (p. 14)

[143] The significance of that concern was emphasized in the Board's "Conclusion" which stated:

> The Board finds that in the circumstances its jurisdiction to make orders in relation to how the RSP operated in prior years is limited. Given the manner in which this matter was brought forward the Board does not have the jurisdiction to change how Newfoundland Power's RSP operated in prior years, either in terms of the rates charged or the resulting balances. The Board does have the jurisdiction to issue an order which sets just and reasonable rates for the Industrial Customers for 2008 and 2009, including the Industrial Customers' RSP rates and how the Industrial Customers RSP operated for those years. The Board also finds that it has jurisdiction to determine whether any overpayment as a result of the interim rates is to be refunded to the Industrial Customer group or placed in a reserve account to the benefit of the Industrial Customer group. ...
>
> (Emphasis added.)

[144] For the reasons already expressed, procedural considerations cannot define the Board's jurisdiction. In allowing itself to be influenced by such matters, the Board erred.

(e) Conclusion

[145] The reasoning articulated by the Board does not justify the conclusions reached. The Board determined that as interim orders had been in effect it had the jurisdiction to modify, in its entirety, the rate structure for the Industrial Customers including the RSP rates and the RSP rules used to calculate that rate. That determination was not challenged on this appeal and we agree that it gave proper effect to the jurisprudence respecting interim orders. Our concerns are that the full implications of that determination were not recognized, that the Board failed to recognize the extent of the power conferred upon it by the *PUB Act*, and that it was unduly affected by procedural aspects whose effect upon jurisdiction was unexplained.

[146] It is apparent from the Board decision that it considered the load variation balances in the RSP to be "excess revenue" as contemplated by subsection 75(3) of the *PUB Act*. There was no explanation for that conclusion. We agree with the submission of Newfoundland Power that this was an error. "Excess revenue" in that subsection refers to the difference between the revenue received under the interim rates and the revenue

authorized to be received under the final rates. The subsection addresses revenue that was earned by a public utility. However, balances in the RSP are not revenue earned by the utility. They are encumbered revenues in a deferral account which are to be disposed of in accordance with an order of the Board pursuant to the RSP rules.

[147] The Board concluded that it had the power to modify the RSP rules and consequential rates for the Industrial Customers with effect from January 1, 2008. (We note that it was undisputed that there is one set of rules for the RSP which applies both to the Industrial Customers and Newfoundland Power.) It follows that it could modify the RSP rules pertaining to the method of allocating the cost effects of load variations if such modification were in accordance with generally accepted sound public utility practice. The Board did not appear to recognize the implications of its power to modify the RSP rules in that manner. The existing RSP rules apply a "class assignment approach" which means that the cost savings accruing to Hydro because of industrial shutdowns were allocated to the Industrial Customers' side of the RSP ledger. Clearly that is not the only possible approach to the allocation of such costs as witnessed by the operation of the RSP prior to the 2003 GRA. A modification of the RSP rules for the Industrial Customers, which the Board accepts is within its power, could therefore encompass a change from the class assignment approach with consequential effects upon the final rates for the Industrial Customers from January 1, 2008 and upon the appropriateness of contemplated prospective distributions of any balances in the RSP.

[148] The consequential effect of any modification of the RSP rules upon rates, upon the revenue authorized to be earned by Hydro and upon the accumulated balances in the RSP then fall to be addressed by the Board pursuant to the *PUB Act*, including but not limited to subsection 75(3).

[149] Subsection 75(3) authorizes an order that excess revenue be "refunded to the customers of the public utility" or "placed in a revenue fund for the purpose to be approved by the Board". The statutory language pertaining to the reserve fund confers a broad jurisdiction on the Board to deal with excess revenue which jurisdiction should be exercised "to achieve the purposes of the legislation and to implement provincial power policy". *Stated Case*, para. 36. The Board found that it was constrained to ensure that "excess revenue" be disposed of solely for the benefit of Industrial Customers. Clearly that constraint did not arise from the express statutory language of subsection 75(3). There was no analysis from the Board explaining how the scheme or purpose of the *PUB Act* required an

interpretation of that subsection that constrained the power of the Board to deal with reserve funds.

[150] The Board indicated that the constraint arose from "generally accepted sound public utility practice which requires that rates be just and reasonable and not unjustly discriminatory". While application of such practice considerations might (but not necessarily) justify a conclusion to limit disposition of reserve funds to industrial customers in a given case, it does not justify giving a restrictive interpretation to the broad language of subsection 75(3), thereby foreclosing its use and application for all such cases. As noted above, the Board approached this aspect on the basis that the RSP balances should be treated as excess revenue to Hydro. However, on that basis and given the magnitude of the anticipated RSP balances it is apparent that the constraint stated by the Board could adversely affect the ability to establish reasonable and non-discriminatory rates for the Industrial Customers from January 1, 2008. See paragraphs 29-30 above .

[151] Accordingly, the decision of the Board is not capable of being derived from its statement respecting the effect of public utility practice and its conclusion respecting subsection 75(3) is without support.

[152] Furthermore as stated earlier it follows from *Bell Canada 1989* and *Bell Canada 2009* that the balances in the RSP, which would be determined in the process of establishing final rates for the Industrial Customers, would be subject to disposition by the Board in accordance with the RSP rules which are subject to modification by the Board in the application before it.

[153] The Board made repeated reference to procedural considerations as affecting its decision. These procedural concerns do not logically justify the stated conclusion as to jurisdiction. We agree with the submission of the Consumer Advocate that:

> ... First, by virtue of the interim orders and as a matter of law, everything about the Industrial Customers' rates, including the rules pertaining to load variation and the normal load variation allocation rules were made interim and therefore are inherently subject to subsequent review and modification on a retrospective basis. To further insist that Hydro was required to state that which was already the case by operation of law in order for the Board to assume its jurisdiction, is not logical or sustainable.

[154] The Board was presented with an application for Hydro to set final rates for the Industrial Customers effective January 1, 2008. The accompanying letter stressed concern with "the appropriateness of the current mechanism for allocating the impact of the load variation in the

RSP". That was consistent with a concern raised by Hydro in its initial application for interim rates in December, 2007. We note that the record before this Court indicates that since Hydro's application for final rates for the Industrial Customers, all parties (excluding, of course, the Board) set forth their positions respecting the RSP in the course of an interrogatory process and the filing of expert evidence on that issue. The Board did not explain the necessity of a formal application for a change to the RSP in those circumstances, nor did it advert to subsection 3(4) of the *Board of Commissioners of Public Utilities Regulations, 1996*, which would permit the Board to direct Hydro to file a formal application if it considered it necessary for the proper consideration and disposition of an issue.

[155] As stated earlier, exercise of the Board's jurisdiction was not contingent upon the wording of Hydro's application. The Board had the jurisdiction to set final rates and consequently to address the appropriate disposition of balances in the RSP that accumulated during the currency of the interim orders.

[156] In summary, the Board erred in:

1. allowing its determination of its jurisdiction to be arbitrarily limited by the manner in which the issue was brought before it; procedure cannot trump jurisdictional substance;

2. not concluding, in accordance with *Bell Canada 1989*, that, in respect of interim orders, all aspects of rates, including RSP rules, were made interim and therefore inherently subject to subsequent review and possible modification, on an application to make interim rates final; and

3. concluding that the *PUB Act*, properly interpreted, restricted the manner in which deferral accounts could be dealt with and in particular, restricted the classes of beneficiaries of such accounts. See *Bell Canada 2009*.

[157] We conclude that the Board has jurisdiction to deal with and dispose of remaining amounts in the RSP in accordance with the broad powers contained in the legislation, which include, but are not limited to, refunding it to the Industrial Customers. But these powers are not necessarily confined to disposing of the RSP fund balances solely to the benefit of one class of customers, in this case the Industrial Customers. This is not to say, of course, that the Board should include customers other than the Industrial

Customers as beneficiaries, only that the Board has the jurisdiction and authority to, and should, consider the submissions of all interested parties on this issue, taking into account generally accepted sound public utility practice and the imperative of setting just and reasonable rates that are non-discriminatory.

SUMMARY AND DISPOSITION

[158] For the foregoing reasons the decision of the Board declining jurisdiction is incorrect. The appeals are allowed. Order No. P.U. 25 (2010) is set aside. The matter is remitted to the Board for hearing and determination on the merits in accordance with this decision.

[159] The matter of costs not having been fully addressed by all parties, leave is given to any party to apply within 15 days of the release of this judgment for a determination of costs on the appeal. In the absence of such an application, an order will go directing that each party shall bear its own costs.

J. D. Green C.J.N.L.

K. J. Mercer J.A.

M. F. Harrington J.A.